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An Introduction to Some International Law Concepts

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I

International law is the system of norms of conduct that apply on the community of states in their relations with one another.[1] As such, it is a distinct field of legal subject-matter, in the same manner as we speak of criminal law, property law, administrative law, and the other generally recognized "fields" of law. But international law is distinct from all other fields of law in more fundamental ways than merely the description of its subject-matter. These distinctions lie in the subjects upon whom it operates, and in the concepts of sanctions or enforcement.

All law other than international law is designed as a system of norms binding on private individuals (including, of course, non-natural private individuals, such as corporations). To the extent that such laws operate on the state as well, such as constitutional limitations on behavior of the state, they are regulations of the relationships between the state and individuals. By contrast, international law concerns itself solely with states as its subjects upon whom it confers its rights and obligations.[2] It is true that an individual's affairs may be vitally affected by principles of international law, but only in his status as an object, rather than a subject of international law. For example, an individual while present in a foreign state may have been subjected to treatment by the foreign state which was in violation of international law rules as to the treatment of foreigners. If the foreign state refused to give redress, or to allow itself to be sued in its own courts by this individual, his avenue of redress would be to petition his own state to espouse his claim. If his own state were willing to do so, and presented this claim and it proved to be a valid one, the foreign state would become obligated, not to the individual himself, but to the individual's

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† Associate Professor of Law, University of North Dakota. As the title indicates, this article is not designed for scholars in the field of international law. Rather, it is designed to offer orientation on some basic international law concepts to those who are total strangers to the field. Indeed, a scholar's main interest in this article might be to quarrel with dogmatic statements that are made without supporting argumentation or documentation. But, however much criticism might be generated along such lines, the article will have served its purpose if it directs the attention of those unfamiliar with international law to some concepts of most basic concern. It is an attempt to stimulate initial thought and analysis along lines that would provide a skeletal framework for a structuring of the subject.

1. Hackworth, 1 DIGEST OF INTERNATIONAL LAW 1 (1940).
2. Schwarzenberger, 1 INTERNATIONAL LAW 142 (3d ed. 1957).

state.[3] So, international law, in securing justice for this individual, would be operating only upon the two states involved, and he would be securing his reparations indirectly when his own state presumably would turn over to him the damages collected for his losses.

It is true that there has in recent decades been some quarrel with this traditional proposition that international law does not apply to individuals.[4] It has been contended that international law imposes obligations directly upon individuals, and rules relating to piracy and the conduct of warfare have been urged as prime examples of this.[5] And the Nuremburg Trials have been cited as a conclusive example of the recognition by the international community of the direct applicability of international law upon individuals as its subjects.[6] However this may be, it is intended here to do no more than point out the existence of this controversy without attempting to explore into it. The proponents of this novel view have not yet carried the day, and for the initiate it simplifies analysis for him to accept the traditional view of international law as being limited to states.

All national (or "municipal") law is enforced or enforcible by the state, acting through its official machinery. The state is the sovereign that makes these laws, and it has at its disposal the physical means to apply whatever sanctions may be necessary to enforce obedience to its laws. The sovereign ordains laws for its subjects without benefit of having been imposed by any sovereign or agency superior to the states themselves that are the subjects of the law. The sovereign state is by definition the highest legal entity, and it knows no superior. Hence, the sanctions of international law must be those that equal subjects impose on each other. International law is then further distinct for the lack of any enforcing agency superior to the subjects of the law themselves.

This lack of customary sanctions in international law has lead some thoughtful scholars to the conclusion that international law is not "law" at all. They would recognize the existence of some phenomenon going by that name, but would characterize it as custom or a moral code outside the scope of law.[7] This is because they consider that sanctions, in the sense that they are known in national

3. This example of international procedures is discussed in Fenwick, INTERNATIONAL LAW 279 (3d ed. 1948).
4. Jessup, A MODERN LAW OF NATIONS 15 (1948).
5. Harvard Law School — RESEARCH IN INTERNATIONAL LAW 751-760 (1932).
6. See Von Knieriem, (tr. Schmitt), THE NUREMBURG TRIALS 28-35 (1959).
7. Austin states that international law "is law improperly so called." Austin, 1 JURISPRUDENCE § 199 (Campbell's Notes, 1874).

law, are of the essence of law, and anything lacking this essence cannot be law.[8] This is a facet of a broader jurisprudential controversy regarding the nature of all law.

In simplified terms, there are two basic schools of jurisprudential thought, both with venerable lineage tracing back at least to the ancient Greeks. These are most commonly referred to as the natural law and the positivist schools. According to natural law theory, law is an entity which exists independently and outside of human will and creation. It is discovered and becomes known to us by the operation of human intellectual processes. Law is what is just, and what is just is discoverable by the human intellect and its rational powers, although they do not create what is just. By analogy, the scientist who discovers a hitherto unknown physical law had no part in the creation of what he discovered. If this is the essence of law, it can readily be seen how the question of sanctions would be a matter of indifference to the existence of law; whether or not a law is physically enforced or obeyed would be a separate inquiry, having no bearing on whether or not the law existed as such. Thus the natural law school has had no difficulty in accepting international law. Indeed, natural law is considered to have made possible the rise of international law as an organized field or discipline, beginning with Grotius in the seventeenth century.[9]

Although the positivist position has been expressed in various ways, the essence of the concept is that law can be distinguished from other types of norms of human conduct by virtue of having some kind of a human sovereign agency as its source and being enforced by the sovereign through more or less explicit and identifiable sanctions. Anything lacking these ingredients must be some phenomenon other than law. With such an attitude, the positivists were naturally reluctant to accept international law as a member of the fraternity in good standing. Austin, one of the most noted progenitors of the contemporary positivist school, flatly rejected the proposition that international law is law.

Subsequent positivists have sought to include international law within their system. It seemed like an increasing source of embarrassment to them if they were to reject as law something which the world community solemnly considered to be law and asserted essential rights under it. A dualistic theory of law was evolved,

8. Jhering states as follows: "A legal proprosition without legal compulsion behind it is a contradiction in itself; a fire that burns not, a light that shines not." Quoted in Pound, OUTLINE OF JURISPRUDENCE 75 (5th ed. 1943).

9. Von Schuschnigg, INTERNATIONAL LAW 6 (1959).

notably by Kelsen, to accommodate international law within the positivist system. It was considered that, according to the subjects upon which it operated, law might have different types of supreme sources, and hence different types of sanctions to compel obedience.[10] Under this theory the supreme source of international law becomes the consensus of the international community, as a substitute for the authority of the state; and the enforcing sanctions become the pressure and censure of the international community against any violator, and its tolerance of war being waged by the party offended against the violator, the offended state then occupying a position analogous to the state's policeman. The natural law position, of course, is monistic throughout, and would find repugnant any such dualism or pluralism.[11] And a positivist who takes a monistic view that law is exemplified by the express legal systems of national states can scarcely accept international law within his legal system.

II

The international community of sovereign states by definition lacks any superior agency for the formulation and enforcement of law, unlike municipal law. The specific norms of international law must then derive from agreement among the states themselves, the subjects of the law. It is the duty of every state to honor such agreements, as is expressed by the maxim *pacta sunt servanda.* This maxim represents at least one of the most significant foundations of international law. Indeed, some distinguished international jurists consider this principle to be the neucleus from which it depends.[12] This system of agreement between states takes two basic forms. One is the general consensus of the international community as to the norms that will be binding on them. The other consists of the express and more formal treaties whereby states bind themselves in certain explicit ways to each other.[13]

In a sense it may be argued that only the general consensus is really the law, and the treaties are analogous to contracts between individuals under a system of municipal law. If a question is raised as to whether a contract has been broken, one does not look to the contract itself for principles of law relative to contracts, but rather to the law of contracts that has been provided by the state. Similar-

10. See Kelsen, *The Pure Theory of Law,* 55 Harv. L. R. 44, 66 (1941).
11. For a discussion of monistic and dualistic theories, see 1 OPPENHEIM'S INTERNATIONAL LAW (Lauterpacht) 37 (8th ed. 1958).
12. Anzilotti, 1 CORSO DI DIRITTO INTERNATIONALE 41 (3d ed. 1928); quoted in translation in Hudson, CASES ON INTERNATIONAL LAW 4 (3d ed. 1951).
13. Podesta Costa, 1 DERECHO INTERNACIONAL PUBLICO 28 (3d ed. 1955).

ly it may be argued that if violation of a treaty has been alleged, one determines the issue by reference to general principles of international law (beginning, presumably, with *pacta sunt servanda*), rather than to the treaty itself. Yet, if international law is formulated by the sovereign states of the international community themselves, one may say that the law binding on a state conists of all the rules to which the state has agreed, irrespective of the particular form of such rules. In this view, the analogy between treaties and private contracts is imperfect. We don't conceive of private individuals as devising special "laws" for themselves in contracts, since law-giving is the exclusive prerogative of the state. But there is no such reluctance to conceive of the state as making law for itself in conjunction with other states as parties to treaties.

Moreover, some treaties are legislative in nature, and are designed to set up a binding code of conduct on the parties within the area covered by such treaties. These are characteristically multipartite treaties designed to regularize a relatively broad field of international conduct. Some of the better known examples of treaties of this type are the international postal conventions and the Hague and Geneva conventions relating to the rules for the conduct of war. If a preponderance of the states of the world subscribe to such treaties, and they are observed over a substantial period of time, they may be said to have become part of general international law. Such treaties may represent a codification of what had already been established as part of international law through the consensus of states as emplified by their long-continued practice. Such codification serves the purpose of clarifying ambiguous or debatable points of general law. For example, in 1958 in Geneva there was an attempt to arrive at a general agreement relating to the vexing matter of law of the marginal seas and their limits. No significant agreement among the states present was reached, but continuing attempts are being made along such lines.

It is a basic proposition that a state is not bound by any treaty to which it is not a party. However, if one of these legislative treaties should be of such nature as to gain wide acceptance, it appears that the entire community of states would be carried along in its wake. At least this would tend to be particularly true as to treaties that primarily codify existing international law.

The consensus outside of treaties that forms the basis of international law is revealed chiefly through the customs and practices of states in their dealings with each other, the opinions and writings

of respected authorities in international law, and judicial holdings, particularly of international tribunals. This gives rise to divergences of opinion between states as to the content of some of the rules of international law, as states may vary in practice as to what they have regarded as legal, or they may differ as to which of two conflicting authorities is correct. Thus, international law as defined by one state may differ from international law as defined by another state.[14] But, although such divergences may lead to the most serious practical consequences, they are not sufficient to destroy the edifice of international law itself.

It must be borne in mind that the international law system as we know it is a European phenomenon, and an outgrowth of the Roman-Christian culture of Europe. During and prior to the early formulative years of our present international law, lawyers and writers looked to the Roman *"jus gentium"* in dealing with problems between states. The *jus gentium* ("law of peoples") was the system of law the Romans had used for the non-Roman subjects of their Empire. The *jus gentium* as opposed to the *"jus civile"* applicable to the Roman homeland was considered to be a natural precedent for the law to be applied between the peoples of politically fragmented Europe after the disappearance of the Roman Emipre. At least with regard to political concepts (as distinguished from power) Europe has long since dominated the world, and it continues vigorously consolidating its supremacy. So, a system of law that evolved for the regulaton of relations between European states is now essentially world-wide, as a result of Europe's success in providing for the organization of the entire world. All states, however non-European in culture or society they may be, now participate in this consensus stemming from European origins.

III

Courts are a central feature in any system of municipal law. They usually are the highest agency directing the imposition of sanctions for the enforcement of law. Also, they may be viewed as one of the agencies of the sovereignty which formulates or makes internal law. Within the international law system, courts have a much less exalted place. Herein lies another important difference between international and municipal law, though this distinction is conceptually more superficial than those relating to sanctions and the subjects of law.

14. Exemplified by published titles such as Hyde, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (2d ed. 1945), and Sereni, THE ITALIAN CONCEPTION OF INTERNATIONAL LAW (1943).

One of the most important political and legal principles is that of the immunity of any sovereign state from the jurisdiction of any court. The state may, and of course often does, waive its immunity and consent to a court's taking jurisdiction over it. This is true both as to the state's domestic courts and as to international courts. And a state may legally bind itself in advance to submit to a court's jurisdiction over it for cases that may arise in the future, through internal laws waiving immunity before the domestic courts, or through international agreements regarding the jurisdiction over it of international courts. This lack of compulsory jurisdiction is a necessary result of the concept of the sovereignty of states. For, if courts are an agency of the sovereign state that by definition knows no superior it is a logical impossibility that there should be courts capable of commanding the state, unless the state voluntarily delegates such power to it.

Nevertheless, because states have chosen as a matter of policy to submit some of their international differences to international courts for adjudication, such courts have assumed greater significance in international law. Such courts are a relatively recent innovation. There is presently the International Court of Justice, which was created by the United Nations Charter.[15] This is a direct successor to and a continuation of the former Permanent Court of International Justice, which functioned under the League of Nations. Prior to that time there were no courts, in the narrower sense, of general international scope. There has existed since 1899 the Permanent Court of Arbitration at The Hague. But this was not a "court" in the usual or technical sense, but rather a permanent panel of arbitrators from which, as cases arose, panels would be chosen to form tribunals of arbitration.

While arbitration is a form of judicial procedure, it is distinct from court procedures. The practice of recourse to judicial procedures for the settlement of international disputes developed chiefly in the nineteenth century before arbitral tribunals.[16] One method whereby arbitration might arise would be where two states would agree, after a dispute had arisen between them, to submit the matter to a board of arbitration, composed in a manner acceptable to both states. The states would bind themselves in advance to accept and obey the decision of the tribunal. When the case was concluded, the tribunal would cease to exist, nor would any later disputes be-

15. The U. N. Charter establishes the Court (Chapter XIV, Articles 92-96), but the Statute of the International Court of Justice is a distinct document from the Charter.

16. The first modern arbitration treaty is usually considered to be the Jay Treaty of 1794 between United States and Great Britain. 1 TREATIES AND CONVENTIONS 590.

tween the parties be similarly arbitrated except as they might agree to such procedures as each individual dispute arose. However, states could commit themselves to permanent or indefinite treaties of arbitration, wherein they would agree that certain described types of disputes would be referred to arbitration, with provisions for the selection of tribunals as need should arise. The Hague Conference of 1899 provided for arbitration commitments of the latter kind. However, it has remained a matter of state policy and discretion as to whether it will bind itself to submit to arbitration, and international law has never compelled a state to do so. The use of arbitration has been particularly widespread in the field of private international claims, especially private war claims.[17] Arbitral procedures, however, have fallen largely into disuetude during the last three decades.

The arbitral tribunals are by nature completely the creatures of the states agreeing to their composition. By agreement the states may limit the subject-matter into which the tribunal may inquire, and may determine the specific procedural rules to be followed. A court, by contrast, is a creature of the law, rather than of the parties; the extent of the court's inquiry is determined by the law the court finds applicable to the case before it, and its rules of procedure are determined by the court itself or by the laws instituting the court, and the parties must conform to them. And, although a court functions only as cases are brought to it for decision, it is conceived as a permanent institution, rather than being assembled on an ad hoc basis for specific cases or groups of cases, as is characteristic of international arbitral tribunals. Once the litigant states are before an international court, customary general judicial concepts attach — though not, of course, the special judicial concepts of any one state as such.

No hierarchy of courts has ever developed in international law. The International Court of Justice is the only court in its system, and it exercises only original jurisdiction. There are no courts below it for which it might discharge an appellate function, nor is there any judicial appeal from its decisions. If the volume of litigation were to warrant, there is no inherent reason why a system of inferior courts could not be developed. However, relatively few cases are brought before the International Court of Justice, as is indicated by the fact that it has been asked to adjudicate only some

17. Another landmark in the development of arbitration was the Treaty of Washington of 1871 between United States and Great Britain for the disposal of the "Alabama" claims growing out of the American Civil War. 1 TREATIES AND CONVENTIONS 700.

thirty cases since its inception in 1946. This court, including its League of Nations predecessor, is not entirely unique, as a few other international courts have existed, but have been on a specialized or regional basis, such as the Central American Court of Justice. So for the present, at least, the International Court of Justice for most practical purposes may be considered as the unique totality of the international court system, as distinct from the system of arbitration.

The average private individual usually seeks relief in a court of law only for his weightiest problems, involving his most important personal affairs or substantial amounts of money. Lesser matters he usually prefers to resolve in less ponderous ways, even though he might have a good cause of action against his adversary. Just the reverse has tended to be true with regard to the matters states lay before the International Court. They have generally been willing to bring only relatively minor matters to court, and have preferred to retain under their complete control the handling of major disputes that they deem to involve their vital national interests. Indeed, it has been argued by distinguished international lawyers that only minor international disputes are properly susceptible of judicial treatment.[18] And it remains debatable whether a state could legally assign to a court the power to make a final determination as to matters affecting a state's vital interests, including perhaps even its integrity and existence, and thus divest itself of its prime function and duty of providing for the common good.

What happens when an international court pronounces judgment against a respondent state? That state then becomes obligated to honor that judgment. What if that state refuses to do so? It then becomes exposed to such sanctions as its adversary and other members of the international community may choose to apply against it, with war being the ultimate sanction. The individual defendant who has lost his litigation in a municipal law system cannot hope to resist successfully the enforcement of a final judgment against him. True, he may have some success, at least temporarily, as a fugitive from the law in various ways. But he cannot defy the judgment, as his individual power is as nothing compared with the power of society as organized through the state. This is not true as to the comparison of our state litigant in an international court vis-a-vis the world community, particularly if such state be a major power. The international court has no sheriff or marshall whom it can order

18. Lauterpacht, THE FUNCTIONS OF LAW IN THE INTERNATIONAL COMMUNITY 139 (1933).

to enforce its judgments. At best, it could only appeal to other states to bring pressure or force to bear on the recalcitrant defendant, and these other states would respond to such an appeal primarily as they considered their national interests dictated. Here again is raised the question of sanctions under international law, and an illustration of how they contrast with the routine and presumed sanctions underlying municipal law.

Mention may be appended here as to the relationship of domestic courts to international law. In the sense that is being discussed here, they do not participate in international life. However, principles of international law may be involved in cases brought before them by private litigants, and they accordingly will render decisions making pronouncements regarding international law.[19] Such decisions participate in the growth and development of international law, and have persuasive influence on it, in much the same way as the opinion of an influential writer or authority in that field.

IV

Law may be viewed as a system of ordering relationships between a plurality of entities. It therefore presumes some manner or organization of those entities. In discussing international law the entities involved are states. So if international law is indeed law (some positivists to the the contrary notwithstanding), then presumably some form of international organization evolved as soon as human society had created two states that were aware of each other's existence.[20]

Little in the way of formalized international relationships were required under the political conditions of the ancient world. The historical record indicates that most of such problems as existed were resolved when one oriental empire conquered and annexed another. However ,the Greek city-states formed various leagues and alliances, mostly for purposes of military security against one of their more ambitious colleagues or against Persia.[21] After the Roman Empire had established its broad hegemony, about the only state with which it had to deal (apart from the chaotic barbarians of northern Europe) was Parthia, the then contemporary version of Persia (now Iran).

Yet Rome had purported to rule the entire civilized world. After

19. *E. g.*, Molina v. Comision Reguladora del Mercado de Henequen, 91 N.J.L. 382, 103 A. 397 (1918), where a New Jersey court was called upon to discuss whether the Mexican state of Yucatan had international personality.

20. Nussbaum, A CONCISE HISTORY OF THE LAW OF NATIONS 5 (1954).

21. *Id.* at 10.

the fall of Rome, it continued to provide a tradition or ideal of sovereign unity that influenced international organization throughout the Middle Ages and into modern times, and perhaps is part of the psychological background of our present United Nations. The concept of one "emperor", as a successor of the Roman caesars continued throughout medieval political thought in Europe as an ideal for the organization of the political community of Europe. Although this ideal never achieved any significant success as a matter of practical politics, it was not fully laid to rest in that form until 1806, with the renunciation by the last Holy Roman emperor of that imperial title in favor of the more realistic title of emperor of Austria.

Long before that date, however, the one emperor ideal had ceased to be effective. Early modern times generally lacked any recognition of even a theoretical supra-national authority, and formal international organization consisted largely of cynical military alliances. This may seem to be largely anarchical, but so long as the several states recognized and observed certain proper ways of conducting their relations with one another, there was at least something which could be called a "community of states" as the lowest and loosest level of international organization.[22]

The nineteenth century witnessed the growth of somewhat more formalized international organization.[23] Out of the Congress of Vienna in 1815, wherein virtually all the states of Europe participated in resettling Europe after the Napoleonic upheavals, came the Holy Alliance of the major powers. The Holy Alliance held periodic meetings for a while, took a few active steps such as suppressing a rebellion in Spain in the 1820's, and then more or less lapsed. In Paris in 1856 there was again a significant assembly of the states of Europe taking some united action. Another such assemblage occurred in Berlin in 1878, where the ideal of international organization was expressed as the "Concert of Europe". However superficial these nineteenth century arrangements may now seem, they were an appreciable advance in organizational strength over the mere military alliances that were typical of the eighteenth century.

Finally, the contemporary concepts of international organization were formulated in the League of Nations and its successor, the United Nations. In perspective, they should not be viewed as new or original concepts, or as the origins of international organization.

22. See Fenwick, INTERNATIONAL LAW 101 (3d ed. 1948).
23. See Butler and Maccoby, THE DEVELOPMENT OF INTERNATIONAL LAW, c. XI (1928).

Rather, they should be viewed as the intensification of organization, having evolved along a continuum of organization beginning with the community of states of early modern times, which probably represents a historical nadir of international organization. Probably the most unique aspect of the United Nations is its virtual universality, since primitiveness of communications physically prevented any earlier system from achieving such extent.[24]

The United Nations does not involve a change in fundamental concepts of international law, which rest ultimately on agreements between sovereign states,[25] with some overriding strictures that need not presently concern us. It is true that membership in the United Nations imposes on a state limitations and obligations of action that do not exist under general principles of international law. However, each member state has voluntarily accepted these obligations and limitations, and hence the whole structure rests on agreement among states in the traditional way. The general rules as to the binding affects of international agreements appear to apply to the provisions of the United Nation's Charter. States invoke considerations of their paramount national interests in determining the extent to which they consider themselves bound by Charter provisions or mandates of United Nations organs. All this is quite at variance with any notion that the United Nations is any form of super-state, or that the members have surrendered to it essential characteristics of sovereignty.

Similarly as to sanctions the traditional international law system continues under the regime of the United Nations. It is true that the United Nations provides a more formal and ready enforcement machinery for its decisions than would otherwise exist at international law. Yet, it still has against a recalcitrant state nothing comparable to the force of the sheriff or police against the private individual being subjected to enforcement of domestic law. Sanctions under the United Nations still depend on the volition of the members,[26] who generally have participated in these sanctions in accordance with the dictates of their national intrest rather than out of a pure sense of duty such as is expected of a policeman.

These remarks would not preclude the possibility of the United Nations ultimately proving to be a decisive institution working fundamental changes in international law. The fact of its substan-

24. "The international community today thus has a global membership." Jessup, THE USE OF INTERNATIONAL LAW 22 (1959).
25. Jessup, A MODERN LAW OF NATIONS 124 (1948).
26. Kelsen, THE LAW OF THE UNITED NATIONS 934 (1951).

tially universal membership coupled with its organizational coherence certainly offer possibilities for it to make fundamental changes in international law. And the historical ideal and aspiration toward the unity of peoples, in various guises, may give impetus to increased scope and power for the United Nations. But whether such things are to be or should be remain for future decision. For the present the available evidence recommends a conservative and limited view of the United Nations as being an institution existing within the framework of traditional international law and organization.

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