

HEINONLINE

Citation:

Sing. J. Int'l & Comp. L. 327

Content downloaded/printed from [HeinOnline](https://heinonline.org/HOL/License)

Wed May 23 02:16:51 2018

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

Formalism, Pragmatism and Critical Theory: Reflections on Teaching and Constructing an International Law Curriculum in a New (Post-Colonial) Asia

Thio Li-ann*

I. INTERNATIONAL LAW AS PART OF A LAW SCHOOL CURRICULUM

A. Beyond Formalism and Parochialism: The Nature and Legitimacy of Legal Systems

THE teaching of international law within the curriculum of a Law School, serves as a counter-balance to the emphasis placed on commercial or trade law and the general positivist or black letter approach towards the study of law which tends to produce legal technicians.¹ As a subject, international law serves to broaden the perspective of a law student beyond formalism and parochialism.² Students are informed about external developments in the larger community of states and other non-state actors and gain an understanding of the role of their country in these developments. It provides a valuable lens through which one may appreciate the historical evolution and contemporary state of international society.³

* BA (Oxon)(Hons); LLM (Harv); PhD (Cantab); Barrister (Gf), Associate Professor, Faculty of Law, National University of Singapore. This essay develops upon ideas delivered at a Conference convened by the Singapore Society of International Law and the Development of International Law in Asia Institute held in Singapore on 30-31 July 2001 on 'Teaching & Researching International Law in Asia.'

1 Within the context of the Faculty of Law of the National University of Singapore, for example, the general international law course is optional and not considered a 'core' subject. Efforts are currently underway to incorporate an appreciation of an international legal perspective within traditional law subjects like constitutional and administrative law. At present, a compulsory course on transnational legal problems is being mooted to broaden a student's appreciation on the social context within which law operates. See Alexander FH Loke, 'Educating the Thinking Lawyer: The Past, Present and Future of University Legal Education in Singapore' in *The Singapore Legal System*, Kevin YL Tan Ed, 2nd ed, (Singapore University Press, 1999) 324-367.

2 Some knowledge of legal history and comparative law is necessary as well.

3 On the teaching of international law in various jurisdictions, see generally John King Gamble, *Teaching International Law in the 1990s* (The American Society of International Law, 1992); John King Gamble & Christopher C Joyner, *Teaching International Law: Approaches and Perspectives* (Washington DC: The American Society of International Law, ASIL Bulletin No 11, 1997); David Kennedy,

International law engages bigger and more fundamental questions. It invokes jurisprudential questions pertaining to the nature of law and legal systems, the relationship of law to justice and morality and the social nature of law.⁴ It places the category of 'law' under scrutiny, by drawing attention to legal systems existing beyond the municipal context, which students are most acquainted with. This promotes an appreciation of legal pluralism and different systems of law.

Given the entirely distinct context within which international society exists and the decentralised or 'horizontal' nature of the international legal system, it allows one to examine the workings of the law outside Austin's narrowly formulated Command Theory of Law. To Austin, the law was a series of commands backed by sanctions, issued by a determinate political superior to a political subordinate. Thus, international law, which relates to sovereign equal states, which interact in the absence of a central legislature, is located as 'law improperly so-called'⁵ in the non-law or positive morality category and thereby expelled from the province of jurisprudence.⁶ Austin equated law with

'International Legal Education' (1985) 26 *Harvard Journal of International Law* 362; James Crawford 'Teaching and Research in International Law in Australia (1981-1983) *Australian Yearbook of International Law* 176; Bengt Broms, 'International Law in the Law School Curriculum' in *Essays in Honour of Wang Tieya*, R St J Macdonald ed, (Martinus Nijhoff, 1993, Kluwer Academic Publishers) 79-89; Bin Cheng ed, *International law: teaching and practice* (London: Stevens, 1982); 'International law and the Modern Law School', (1963) *X Netherlands International Law Review* 410-441.

4 See, eg, Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *EJIL* 248-307.

5 'A few species of the law which are set by general opinion have gotten appropriate names ... There are 'laws which regard the conduct of independent political societies in their various relations to one another. Or rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations are usually styled *the law of nations or international law*.' John Austin, *The Province of Jurisprudence Determined* (1832: 1995 edition edited by Wilfred E Rumble) at 123.

6 ... the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions; by fear on the part of nations, or by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected: John Austin, *The Province of Jurisprudence Determined* (1832) at 201 (Berlin, Hampshire and Wollheim eds, 1832). On the deficiencies of Austin's analysis of international law, see HLA Hart, *The Concept of Law* (Oxford University Press, 1994, 2nd ed) Ch 10.

the sovereign will or state will. As such, the state as creator of law is not subject to the law; hence, 'might is right'. One is then left with the polemic: How can international law exist among sovereign states, given the *a priori* positivist assumption that the sole source of legal norms resides in the will of states?

This impugning of the juridical quality of international law tends to compel teachers of international law to grapple with the hoary chestnut, is international law 'law', prefacing their course in almost apologetic tone.⁷ This is an excellent gateway to examine various legal theories and to examine international law from diverse perspectives. There is a wealth of resources to draw on, – feminist legal studies, critical legal studies, international relations theory and policy-oriented studies – beyond the narrow ken of legal positivism.⁸

B. Examining International Law's Claim to Universality

The contestation of 'international' law's universalist claims also provides an opportunity to explore, through a frank acknowledgement of the highly politicised environment in which international law operates, the degree to which the values embodied in international legal norms

7 For a personal view on the neurosis an international lawyer has faced in teaching the subject and some imaginative suggestions on the subject, see Gerry Simpson, 'Up the Magic Mountain: Teaching Public International Law' (1999) 10 *EJIL* 70-92.

8 For an excellent reader into various methods adopted towards international law, see the 'Symposium on Method in International Law: Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *AJIL* Steven R Ratner and Anne-Marie Slaughter eds, 291-423. For readings on new approaches towards international law, see David Kennedy & Chris Tennant, 'New Approaches to International Law: A Bibliography' (1994) 35 *Harvard Journal of International Law* 417-460; David Kennedy, *A New Stream of International Law Scholarship*, (1988) 7 *Wis Int'l LJ* 1, 3-40; Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *EJIL* 66-96; Philip R Trimble, 'International Law, World Order and Critical Legal Studies' (1990) 42 *Stanford Law Review* 811-845. On political scientist perspectives, Anthony Clark Arend, 'Do Legal Rules Matter? International Law and International Politics' (1998) 38 *Virginia Journal of International Law* 107-153; Christopher C Joyner, 'Teaching International Law: Views from an International Relations Political Scientist' (1999) 5 *ILSA J Int'l & Comp L* 377. For a useful companion text which seeks to critically engage topics usually contained in a classic international law syllabus, see Anthony D'Amato ed, *International Law Anthology* (Cincinnati: Anderson Publishing Co, 1994); See also BS Chimni, *International law and world order: critique of contemporary approaches*, (New Delhi/Newbury Park, California: Sage Publications, 1993.)

are representative and authoritative.⁹ In this conception, international law should be approached as a dynamic process rather than a fixed and static code. Given that international law was harnessed as a tool during the colonial era to facilitate the colonial project,¹⁰ an appreciation of this provides a useful vantage-point from which to track the substantive changes made to international legal rules. This development was precipitated by the mushrooming of state especially in Africa and Asia in the wake of colonialism that peaked in the 1960s-1970s. With this increase in the number of states came a multiplication of different state interests, jostling for recognition as international norms. We should seize the opportunity to teach international law as a dialogue of values, a values-oriented subject, rather than just to transmit information about legal procedure and content. In this way, fundamental concepts like legal 'authority' and 'legitimacy' can be tent to the quick.

As an international lawyer who is Asian and who currently teaches in an Asian law school, whose international legal education was Anglo-American in nature, I would like to offer some personal reflections on teaching international law in Asia. At the outset, I must set forth the caveat that I do not subscribe to the view that there is a particular 'Asian' perspective towards viewing international law. I do appreciate that Asians did not participate in the early formative stages of international law and that their concerns were not always articulated or considered, given the European and Euro-centric origins of international law. Asian states today, like all other states, are able to compete in the marketplace in seeking to mould international law as a vehicle through which to advance their interests and concerns. Powerful states do, however, enjoy a privileged position, even an entrenched dominance. Another caveat is that 'Asia'¹¹ is not a self-evident entity in the same way Europe

9 Thomas M Franck, 'Legitimacy in the International Legal System' (1988) 82 *AJIL* 605. See James Thuo Gathii, 'Review Essay: International Law and Eurocentricity' (1998) 9 *EJIL* 184.

10 For an excellent examination of how 'sovereignty was shaped by the colonial encounter [reproducing] the inequalities inherent in that encounter' see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40 *Harvard Journal of International Law* 1-80 at 80.

11 The Asian Yearbook of International Law, published under the auspices of the Foundation for the Development of International Law in Asia (DILA) considers the breadth of Asia thus: 'Asia's western boundary is thought to run southward along the eastern foot of the Ural Mountains to turn approximately southwestward thereafter to the northern shore of the Caspian Sea, and from there to run generally southwestward to the Caucasus Mountains which form the boundary

may be. Even so, within Asia or among those who would identify themselves as Asian, there is a plurality of views. This might well be expected within the context of a global, multicultural world, inhabited by both statist and non-statist voices.

In this article, I will proffer my thoughts on matters relevant to teaching and devising a curriculum for international law within a law school in a post-colonial Asian state. This essay is structured thus: Part II considers various unique perspectives an international lawyer may bring to his field. Part III examines various approaches towards the research and study of international law, which influences the teaching of international law. Part IV concludes with some general considerations in relation to the teaching of international law in an age of globalisation.

II. THE UNIQUE PERSPECTIVE OF INTERNATIONAL LAW AS A DISCIPLINE

One of the more scathing critiques levied against international law is that it lacks legal quality in terms of generality of application and authoritativeness, being ultimately a function of politics. As Hans Morgenthau asserted, whether or not states comply with international law turns on whether it comports with their national interests. Ultimately, that power determines political outcomes.¹² Law is merely one factor states weigh up, in a kind of cost-benefit analysis, in determining their behaviour. This is the basic insight of legal realism. While international lawyers are not the only ones concerned with the state of international affairs and international society, it is argued that law as a discipline sheds a unique perspective on this subject matter. While a political scientist or international relations specialist might focus upon political structures and interests and a historian might approach the subject in the form of narrative, lawyers can introduce the following insights and perspectives to the field.

until the Black Sea is reached. The Mediterranean coast is then the continent's limit, which thereafter runs south across the isthmus of Suez and along the coast of the Arabian peninsula. Although the Pacific Ocean forms a natural boundary of the continental landmass to the east, the island arc which includes Japan, the Philippines and Indonesia, as well as many smaller archipelagos and island States, are an integral part of Asia.' (1991) 1 *Asian Yearbook of International Law*, 'Introduction by the General Editors' at xi.

- 12 Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred Knopf, 1959) 10 and Chs 18 and 19.

A. Law as a Tool of the Protagonist

First, law may be seen as a tool of the protagonist, in which legal arguments are framed in terms that seek to serve and advance the interests of the relevant actor. For example, before retaliating against the Taliban regime in Afghanistan for harbouring Al Qaeda, the terrorist group headed by Osama bin Laden which is blamed for the 11 September 2001 World Trade Centre and Pentagon attacks, the United States sought to justify its measures as a defensive response to homeland attacks.¹³ This would *prima facie* be consistent with the 'inherent right' to self-defence affirmed in article 51 of the United Nations Charter and recognised as customary international law, bearing in mind that forcible countermeasures would have to be necessary and proportionate. Both NATO and the United Nations Security Council affirmed the right to individual and collective self-defense, thus providing a legitimating basis for the subsequent US military engagement in Afghanistan.¹⁴ Of course, the option of using coercive power to shape interests remains the exclusive purview of large and powerful states.

B. Law and Justice: Questions of Right and Wrong

Second, law engages questions of objective justice or at least, raises issues of 'right' and 'wrong'. In assessing the fairness or otherwise of law, we come in direct contact with issues of justice, morality, and the need to make our philosophical assumptions overt. In a post-modern, pluralistic universe, with its scepticism towards 'grand theory', there is danger that 'justice' as a concept falls prey to the abyss of relativism. 'Justice' becomes reduced to nothing more than a label

13 See generally, ASIL Insights, 'Analyses of International Legal Issues Related to the Terrorist Attacks' at <http://www.asil.org/insights/insigh77.htm> [visited 5 Nov 2001].

14 See Statement by the North Atlantic Council in Response to the Terrorist Attacks Against the United States (12 Sep 2001) [available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>, visited 5 Nov 2001] which invoked Art 5 of the Washington Treaty which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all. See also Security Council Res 1368 (On Threats to International Peace and Security Caused by Terrorist Acts), S/RES/1368 (12 Sep 2001) [available at <http://www.un.org/Docs/scres/2001/res1368e.pdf>, visited 5 Nov 2001] It is sufficient to note here that the US campaign against the Taliban government in Afghanistan for harbouring terrorists, commencing Oct 2001, must entail a broad reading of anticipatory self-defence. It raises issues too of the proportionality of the measures adopted against Afghanistan.

for one's political preferences or agenda. This is especially so when we abandon naturalism anchored in an objective metaphysical idea in favour of naturalist thinking rooted in the Enlightenment era which embraced the idea of autonomous human reasoning. With this, natural law became synonymous with subjective ideology or political theory.¹⁵ Hence, the antimony between 'power' and 'justice' becomes no more than a stand-off between competing political ideologies.¹⁶

However, the importance of incorporating 'justice' as an integral element of legal discourse persists. To focus on black letter rules alone confers a sacral and pseudo-objective quality on existing law which embodies one set of political preferences. As Professor Joseph Lador-Lederer quipped incisively, 'positivism is selective and slanted – without saying so.'¹⁷ Naturally, in a post-modernist era, one's vision of justice may be no more than one of many voices crying out in the ideological wilderness, but it has the virtue of being intellectually honest and explicit. Only then may the merits of any one ideology be assessed directly. In a multicultural world, an attempt to garner cross-cultural consensus may lead to a 'lowest common denominator' approach; but this is the inherent limitation of pluralism. One may see signs of a shift towards a more communitarian vision of world legal order, beyond the classic bilateral or 'contractarian' vision, in the development of higher order norms based on the ultimate goals of global peace and human dignity. This may be evident from the concept of *ius cogens* norms which cannot be derogated from, obligations *erga omnes* or even the substantive limits on the developing law of countermeasures which serve world public order values.¹⁸ There are attempts to capture

15 For an excellent discussion of the distinction between the perennial jurisprudence of natural law based on objective metaphysical ideas and Enlightenment naturalism based on philosophical nominalism, see Stephen Hall, *supra* note 4, esp at 273-276. For a contemporary positivist view on the sources of law, see GM Danilenko, *Law-Making in the International Community* (United States: Kluwer Academic Publishers, 1993).

16 M Sornarajah, 'Power and Justice in International Law', (1997) 1 *Sing J of Int'l & Comp L*, 28-68.

17 JJ Lador-Lederer, *International group protection: Aims and methods in human rights*. (Leyden: AW Sijthoff, 1968), preface.

18 Art 50 of the Draft Articles on Responsibility of States for Internationally Wrongful acts adopted by the Drafting Committee on second reading, UN Doc A/CN.4/L.602/Rev.1 (26 Jul 2001) states that countermeasures shall not affect various obligations, including the obligation to refrain from the threat or use of force as embodied in the UN Charter, to protect fundamental human rights and to respect obligations of a humanitarian character prohibiting reprisals, in addition to obligations under peremptory norms of general international law.

the idea that certain norms, which protect interests serious enough to implicate the collective interests of states or a group of states should entail graver consequences in the event of being breached.¹⁹ This is reflected in the debate over the concept of 'international crimes' within the context of state responsibility, which was defined in article 19(2) as:

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime.²⁰

By maintaining a differentiated regime of responsibility for breaches of international crimes and international delicts respectively, the idea was to demonstrate that the international community held certain pre-eminent common interests or values which were to be afforded greater legal protection by attaching graver legal consequences to their violation. The idea behind international crimes, in the opinion of Professor Georges Abi-Saab, represents a progressive evolution from an international law that was inter-subjective to a more community-oriented system. In this respect, he considered that the removal of this concept from the International Law Commission's (ILC) Draft Articles on State Responsibility might be retrogressive insofar as it might weaken the recognition of a qualitative hierarchy of norms.²¹

Notably, article 19 is not present in the draft articles adopted at the Second Reading by the ILC. This indicates the current preference for a unitary system of responsibility, albeit one within which special allowance is made for breaches of *ius cogens* norms in the form of more onerous legal consequences.²² This might well be considered the

19 See Art 41, Draft Articles on Responsibility of States for Internationally Wrongful acts adopted by the Drafting Committee on second reading, UN Doc A/CN.4/L.602/Rev.1 (26 July 2001) which deals with the consequences of a serious breach of an obligation under peremptory norms of general international law.

20 Draft Articles, adopted at First Reading. For a critical perspective on the Draft Articles, see Philip Allot, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard Journal of International Law* 1-26. For an excellent collection of materials on state responsibility, see the web-site of the Lauterpacht Research Centre for International Law, University of Cambridge, at <http://www.law.cam.ac.uk/RCIL/HOME.HTM> [visited 5 Nov 2001], under the heading of 'State Responsibility Project'.

21 Georges Abi-Saab, 'The Uses of Art 19' (1999) 10 *EJIL* 339-351.

22 Special Rapporteur James Crawford was especially critical of the idea of international crimes as embodied in article 19 of the Draft Articles: see his First Report, UN Doc A/CN.4/490 (24 Apr 1998), including Addenda 1-3. For a

ghost of article 19, the reintroduction of a binary regime by other means. Nonetheless, it displays the resilience of the idea of a developing international public order, the idea that certain 'wrongs' subvert the international order and implicate the interests of the international community as a whole. This recognises that law and the long term interests of states can coincide and fuel the development of a shared normative discourse, shaping expectations of state behaviour in areas where international co-operation is mutually beneficial.

On the issue of objective justice, we need a strong appreciation of history, including alternative views of how communities beyond Europe inter-related, in order to have the context through which to appreciate remedial claims for past injustices.²³ For example, the High Court of Australia in the seminal case of *Mabo v Queensland*²⁴ rejected the idea that Australia was *terra nullius* at the time of British colonisation, borrowing from the reasoning of the ICJ in the *Western Sahara* case. It noted that international law at the time of the European conquest and colonisation recognised that the occupation of *terra nullius*, that is land that was uninhabited or inhabited by 'backward peoples' with primitive levels of social organisation, was an effective way of acquiring territorial sovereignty. However, this presumption in the 20th century was considered racist and could not be utilised to justify denying indigenous people the occupation of their traditional lands. Thus, the past racist premises of international law, acknowledged as a legitimate, important influence on common law in Australia, which was increasingly rejected largely owing to the egalitarian precepts of contemporary human rights law, could no longer hold. Hence, the common law could not be frozen in an age of racial discrimination.²⁵ Thus, changes were warranted with respect to the domestic law of native title. Law and the legal values are not static but dynamic, changing as more justice-

discussion of the Draft Articles adopted at the Second Reading, see James Crawford, Jacqueline Peel & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, available at the web-site of the European Journal of International Law at <http://www.ejil.org/journal/new/new0109.html> [visited 5 Nov 2001].

23 See, eg, Benedict Kingsbury, 'Claims by Non-State Groups in International Law' (1992) 25 *Cornell International Law Journal* 481-513.

24 *Mabo v Queensland* (No 2), (1992) 175 CLR 1 (High Court of Australia).

25 On the impact of *Mabo* and subsequent related developments, see MA Stephenson, and Suri Ratnapala (eds), *Mabo: A Judicial Revolution: The Aboriginal Land Rights decision and its Impact on Australian Law* (St Lucia: University of Queensland Press, 1993); Indigenous peoples and their relationship to land, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A Daes, UN Doc E/CN 4/Sub 2/2001/21, 11 Jun 2001, paras, 32, 47, 65, 90.

based claims are articulated and jostle for attention in the international arena.

Most importantly, this angle of enquiry focuses attention on the fundamental issue of not only who international law serves, but who international law *should* serve. Are the interests of all states served by existing law? What about those of non-state actors, given the contemporary trend towards a more inclusive notion of the international community?²⁶ Rather than a legalistic, rules-based approach towards the law, where the focus is on texts and how to interpret legal provisions, the enquiry focuses at a deeper level and does not presume that texts are self-validating. Instead, it grapples with issues of normative legitimacy: What ought the law to be? Theory is fundamental here. For example, Professor Fernando Teson²⁷ presents a challenge to the structure and goals of international law in articulating a Kantian theory, which focuses on the normative status of the individual. He argues:

Traditional legal theory focuses upon the rights and duties of states and rejects the contention that the rights of states are merely derivative of the rights and interests of the individuals who reside within them. Accordingly, international legitimacy and sovereignty are a function of whether the government politically controls the population, rather than whether it justly represents its people...

26 For example, in relation to the latest version of the Draft Articles on State Responsibility adopted in Aug 2001 by the International Law Commission, 53rd Sess, UN Doc A/CN.4/L.602/Rev.1 (26 Jul 2001), arts 25, 33, 42, 48, reference was made to 'the international community as a whole' rather than 'the international community of states as a whole' as in art 53 of the 1969 Vienna Convention on the Law of Treaties. See the Fourth Report of the Special Rapporteur, 31 Mar 2001 (A/CN.4/517) at para 36: "Turning to the definition of 'injured State', a number of governments have suggested that the phrase 'the international community as a whole' used in art 43 and elsewhere should read 'the international community of States as a whole'.²⁶ They point in particular to the definition of peremptory norms in art 53 of the two Vienna Conventions of 1969 and 1986. The Special Rapporteur does not agree that any change is necessary in what has become a well-accepted phrase. States remain central to the process of international law-making and law-applying, and it is axiomatic that every State is as such a member of the international community. But the international community includes entities in addition to States; for example, the European Union, the International Committee of the Red Cross, the United Nations itself. The International Court used the phrase 'international community as a whole' in the *Barcelona Traction* case, and it has been used in subsequent multilateral treaties such as the Rome Statute for the International Criminal Court, 1998, art 5(1)."

27 Fernando Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia LR* 53. See Philip Allot, 'Reconstituting Humanity – New International Law' (1992) 3 *EJIL* 219-252 Richard Falk. *Law in an emerging global village: a post-Westphalian perspective* (Ardsley, NY: Transnational Publishers, 1998).

International law thus conceived, however, is incapable of serving as the normative framework for present or future political realities. While it is understandably hard for lawyers to forsake the statist assumptions of classic international legal discourse, new times call for a fresh conceptual and ethical language. A liberal theory of international law can hardly be reconciled with the statist approach. Liberal theory commits itself instead to *normative individualism*, to the premise that the primary normative unit is the individual, not the state. The end of states and governments is to benefit, serve and protect their components, human beings; and the end of international law must also be to benefit, serve and protect human beings, and not its components, states and governments. Respect for states is merely derivative of respect for persons. In this way, the notion of state sovereignty is redefined; the sovereignty of the state is dependent upon the state's domestic legitimacy; and therefore the principles of international justice must be congruent with the principles of internal justice.

While this reform-oriented approach may be aspirational, even smack of naïve utopianism, it is better to have a northern star to point the way. The alternative might be to succumb to the despair of a tragic cynicism which capitulates to the imperative of order, to the exclusion or marginalisation of justice. The teaching of international law cannot ignore the prescriptive dimension.

C. Law as Language

Language is a form of communication. Within the international context, international law is a method through which states communicate, even if they do not always adhere to international norms. International lawyers are members of a common interpretative community, relating through a shared common language and moral vocabulary. Language creates expectations and this can fuel the belief that a particular norm is legally binding. For example, in reviewing whether the prohibition against torture was a customary norm of international law, the US Circuit Court looked, *inter alia*, at evidence from US diplomatic contacts affirming the universal abhorrence states maintained towards torture. Where torture was alleged, it was noted that the state concerned either denied such allegations, explained that such conduct was unauthorised or argued that the alleged treatment fell short of torture.²⁸ States are bound, morally if not legally, by representations or statements made before the international community.

28 *Filartiga v Pena Irala*, 630 F 2d 876 (1980); (1980) *ILM* 966, US Circuit Court of Appeals, 2nd Circuit.

International law is not the exclusive language of diplomats, given the 'popularisation' of international law with the development of cosmopolitanism or a transnational civil society composed of NGOs and other non-state actors whose common interests transcend borders. We should, for example, note the considerable representation and expression of non-statist views by NGOs, before the World Court where it has sat to give an opinion on matters of global interests as in the case of the 1995 Nuclear Weapons advisory opinion.²⁹ Indeed, this advisory opinion was invoked before a UK Magistrate's Court as a (failed) defence to a charge of criminal damage committed at a military facility that had nuclear weapons on its premises.³⁰ Thus, non-state actors increasingly have opportunities to advance their agenda through the language of international law before international fora, and indeed, to shape the content of international law. For example, indigenous groups and NGOs have actively participated in the drafting of the as yet unadopted UN Draft Declaration on the Rights of Indigenous Peoples.³¹ In December 2000, formal approval was given for the creation of a UN Permanent Forum on Indigenous Issues under Economic and Social Council Resolution 2000/22.³² Thus, indigenous groups have come a long way since the days of the League of Nations, the first permanent international organisation, where no official channels existed for the articulation of indigenous concerns.³³

29 *Legality of the Threat or Use of Nuclear Weapons case*, Advisory Opinion (1997) 35 ILM 809.

30 *Hutchinson v Newbury Magistrates Court* (Queen's Bench Division), 9 Oct 2000; available at <http://www.gn.apc.org/tp2000/legal/hutchin.html>

31 UN Doc E/CN.4/Sub.2/1993/29/Annex I, 23 Aug 1993. The latest draft and associated resources are available at the Fourth World Documentation Project at <http://www.cwis.org/fwdp.html>.

32 This composes 16 independent experts acting in their personal capacity as a high level advisory body.

33 In 1923, Chief Deskakeh on behalf the Six Nations of the Iroquois issued an appeal to the League of Nations Assembly President against the Canada. This sought League intervention to secure recognition of their independent right of home rule on the basis of treaties with the British Crown. Further, League membership was requested, supported by the fact that the Six Nations had, for many centuries, constituted organised, self-governing peoples. The Canadian government issued a Statement disputing the claim to independent nation status, asserting that Indians as His Majesty's subjects were subject to the laws of the land.³³ Under the Indian Act, the government was charged with managing Indian natural resources and engaging in the sociological supervision and education of Indians. In effect, this was tantamount to treating the Indians as a subordinate people under Canadian tutelage, in a manner reminiscent of the mandates system. Nevertheless, reflecting the state-centric bias of the international order then,

While historians may recount international events through narratives, lawyers, imbued with the fundamental spirit of fairness, of hearing both sides in a dispute, will necessarily consider all angles to a dispute, and this may facilitate an inclusive policy-making process.

D. Conflict Resolution: The Architecture of Peace

One of the fundamental purposes of international law is to secure and maintain international peace and security, as order is a pre-requisite for social interaction. One might consider the prevention of war or conflict as a test case for the effectiveness of international law. Hence, an important line of enquiry is the peace infrastructure or architecture that international law provides in relation to conflicts. There is of course no centralised system of compulsory adjudication although there are judicial and quasi-judicial bodies, *eg*, the WTO arbitral dispute settlement facility, the International Tribunal on the Law of the Sea, regional human rights courts and commissions. International law may also be enforced through national courts and institutions. For example, the Convention against Torture³⁴ requires that state parties criminalise torture and further provides a treaty based duty to prosecute or extradite offending individuals, which came sharply into focus with the *Pinochet* case in 1999.³⁵

However, adjudication is the last phase of dispute resolution. It is not necessarily the most preferred or practised of a whole chain of non-judicial options for the amicable settlement of disputes, *eg*, negotiation, consultation, mediation, conciliation and arbitration. For example, the Organisation for Security and Co-operation in Europe (OSCE)'s High Commissioner on National Minorities actively mediates

Canada's view that the Six Nations were not independent states was determinative for the purposes of international law and the League disregarded the petition. The Canadian Government's responded to a paper entitled 'The Red Man's Appeal for Justice' which was distributed among the various Assembly delegations: 'Statement Respecting the Six Nations Appeal to the League of Nation' *League of Nations Official Journal* (1924) 829-842. See generally, Douglas Sanders, 'Aboriginal Rights: The Search for Recognition in International Law' in Blodt, Long and Little Bear eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 298-303.

34 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984)], entered into force 26 Jun 1987. See arts 4, 7.

35 *Regina v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3) [1999] 2 WLR 827. See generally, Diane Woodhouse (ed), *The Pinochet Case: A Legal and Constitutional Analysis* (Hart Publishing, 2000).

between states and groups within states to pre-empt the outbreak of ethnic conflict, particularly in the newly democratising countries of central and eastern Europe.³⁶

III. THE FORMALIST, PRAGMATIST AND CRIT

It is important to uncover our own bias towards the teaching and research of international law. In so doing, we must avoid the malady of descending into a naïve utopianism which seeks to articulate equitable models bearing no relation to the realities of international law and society. This is not to say that justice be not an integral part of international legal discourse. It must, though in a multicultural world, ideas of 'justice' will be contested. We must equally avoid teaching the subject of international law simply as a system of rules as this obscures rather than elucidates the point that law is a tool for the dominant, shutting off the prospect of transformative changes and precluding any reform-oriented thinking and advocacy. Without a vision, the people perish. In not confusing *lex lata* with *lex ferenda*, we can best see international law as a process, in our search for a kind of normative realism as our Archimedean point.

A. Formalism

Berman notes that 'we are all formalists, pragmatists and cultural activists', three approaches one might adopt towards international law.³⁷ The formalist, in seeking to provide a set of general normative criteria governing legal relations, focuses on locating claims within legal categories and balancing them against other relevant legal factors, in search of a legal remedy. For example, whether a particular claimant is entitled to the right of self-determination, which right is itself indeterminate in scope, rests on whether that claimant qualifies as a 'peoples' which again is not a self-evident entity. The deficiency in this process is that it obscures the issue as to why 'peoples' alone, conventionally understood as the population of a colony, should be entitled to self-determination as opposed to ethnic groups within existing

36 See generally, WA Kemp (ed), *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (2001); Steven Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 *New York University Journal of International Law and Politics* 591.

37 Nathaniel Berman, The International Law of Nationalism: 'Group Identity and Legal History' in *International Law and Ethnic Conflict*, David Wippman ed, (Cornell University Press, 1998) 25 at 28-29.

metropolitan states. It describes and identifies the law rather than evaluates it on a teleological or purpose-oriented basis.³⁸ It also veils the fact that international law 'constitutes' groups – it does not simply 'reflect' or 'capture' the realities of international society but shapes it to serve the interests of the international legislator.³⁹ For example, it might be noted that 'minorities' and 'peoples' under international law are entities which have not been authoritatively defined. When identifying beneficiaries to peoples rights or minority rights, there is no definitional 'bright line' as both peoples and minorities are understood to possess certain objective traits, such as ethno-cultural or linguistic traits as well as the subjective aspiration to have that distinct group identity recognised. Classifying a group within a certain category determines the range of legal techniques and strategies available to them pursuant to actualising their aspirations. For example, classifying a group as a 'minority' currently shuts off claims to statehood as minority protection in the form of individual or group rights operates within an intra-state framework and is thus designed to stabilise existing states and promote their survivability. Thus, the category of 'minorities' at international law is a political construct servicing the ends of those empowered to construct international law, reflecting the identity constitutive role of international law. Thus, while the Bosnians in what is now Bosnia-Herzegovina were recognised as a peoples entitled to self-determination expressed through statehood, the Chechens were never recognised as entitled to their own state after the dissolution of the USSR in the early 1990s.

B. Pragmatism

A pragmatic approach prioritises a problem-solving orientation where the imperative is to construct workable, viable solutions to manage particular problems.⁴⁰ Thus, international law is resorted to, to establish

38 For example, the sacrosanct quality of independence borders in Africa pursuant to the *uti possidetis* doctrine was questioned in Makau wa Mutua, 'Why redraw the Map of Africa? A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 1113-1176. For a critical consideration of importing *uti possidetis* into the context of dissolved federations, see Peter Radan, 'Post Secession International Borders: A critical analysis of the opinions of the Badinter Arbitration Commission' (2000) 24 *Melbourne University Law Review* 50.

39 See Annalise Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture' (1993) 106 *Harvard Law Review* 723-740.

40 Siegfried Schieder, 'Pragmatism as a Path towards a Discursive and Open Theory of International Law', (2000) 11 *EJIL* 663-609.

the parameters of the range of possible legal techniques available to contribute towards the settling conflicts. To the pragmatist, flexibility rather than doctrinal niceties is the order of the day. Law is not to be viewed as a closed normative order but must be viewed broadly to appreciate the context within which it develops, operates and is able to induce behaviour. Thus, law is not an island immune from the influence of public policy considerations, moral precepts and even political standards. This pragmatic approach is reflected for example in the phenomenon of 'soft law',⁴¹ norms such as those contained in non-binding instruments like recommendatory General Assembly resolutions or informal codes of conduct such as those contained in Organisation for Security and Co-operation in Europe (OSCE) Concluding Documents. Open-textured ambiguous and elastic ideas like 'sustainable development' are also present in many environmental law documents and left to subsequent development and concretisation where an authoritative definition is not available owing to a lack of consensus.

The focus thus shifts from the juridical status of norms to their potential effects. In this sense, the difficulties in distinguishing between non-law, soft law and 'hard' law is side stepped. There is thus a blurring between these concepts and consequently, the importation of uncertainty. Rather than law-making being understood as a single legislative act, it is more accurately comprehended as a process through which a norm makes a journey through the realms of politics to the realms of law. Attention is thus directed at the effect a norm can exert in terms of influencing state behaviour and compliance rather than its formal status.⁴²

41 On soft law, see Christine Chinkin, 'The Challenge of Soft Law' (1989) 38 *ICLQ* 850. Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413; F Kratochwil, 'How do Norms matter?' in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law*, (OUP, 2000); H Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 *EJIL* 499; U Fastenrath, 'Relative Normativity in International Law' (1993) 4 *EJIL* 305.

42 With respect to the effect a norm might have: 'much will depend, of course, on the conditions of adoption: the more representative of all groups composing the international community, the majority, the closer the resolution will be to being regarded as an instrument of binding force... Likewise, the more precise the content of the resolution, the more likely it is to have legal consequences... Also, the means of enforcement, which are specified, tell much about the probably translation of the resolution into legal reality... Besides the mechanism of control is also quite relevant: its existence gives more chances to the resolution to be enforced than its absence...' Brigitte Bollecker-Stern, 'The Legal Character of Emerging Norms Relating to the New International Economic Order: Some Comments' in Kamal Hossain (ed), *Legal Aspects of the new International Economic Order* (London: Pinter 1980) at 71.

Indeed, some soft law norms can contribute to the development of customary international law or can themselves become 'hard' through their incorporation into domestic law. For example, article 15(4) of the Treaty on Good-Neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic of 19 March 1995⁴³ provided that the norms and political commitments laid down in various soft law documents like the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities⁴⁴ would be treated as legal obligations within the domestic legal system.

Pragmatism is also seen in the work of the OSCE High Commissioner on National Minorities (HCNM) where he crafts practical solutions to national minorities related problems in OSCE participating states based on OSCE principles contained in OSCE Concluding Documents which are not legally binding. The HCNM bases his solutions on international standards, which include within its ambit both soft law norms and hard law norms contained in treaty provisions, with no distinction being drawn between either. Thus, what matters is the attitude and receptivity of states towards these international standards, regardless of their juridical status.

C. Cultural Activism

Beyond the identification, application and negotiation of legal rules, we need to be conscious of the project of cultural activism underlying legal rules and formal categories. That is, to excavate the implicit biases and fundamental values undergirding legal rules, in essence, to ask, who benefits from this particular formulation/interpretation of the rule? What are the effects of their cultural tendencies?

This is particularly important bearing in mind the ethnocentric origins of international law and the importance today of ensuring that international law represents the interests of all states, rather than a

43 Text available at <http://www.htmh.hu/dokumentumok/asz-sk-e.htm>

44 GA Res 135, UN GAOR, 47th Sess, UN Doc A/47/678 (1992); *reprinted in* (1993) 32 ILM 911. For a detailed analysis, see Patrick Thornberry, 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, analysis and observations' Occasional Paper, Minority Rights Group (1993). The scope of the Declaration is currently being discussed by the Working Group on Minorities which is preparing a Commentary to the Declaration: UN Doc E/CN 4/Sub 2/AC 5/2000/WP 1.

select few.⁴⁵ International law was Eurocentric in terms of geographical origin, applying to 'Western Christendom', mercantilist and imperialist in terms of political objectives. At one stage, international law was synonymous with what was known as the 'public law of Europe'. In seeking to justify the selective imposition of minorities obligations underwritten by the League of Nations, M Clemenceau stated in a letter to the Polish premier in 1919 that this requirement did not constitute a departure from past practice:

In the first place, I would point out that this Treaty does not constitute any fresh departure. It has for long been the established procedure of the public law of Europe that when a State is created or even when large accessions of territory are made to an established State, the joint and formal recognition by the Great Powers should be accompanied by the requirement that such State should, in the form of a binding international convention, undertake to comply with certain principles of government. This principle, for which there are numerous other precedents, received the most explicit sanction when, at the last great assembly of European Powers – the Congress of Berlin – the sovereignty and independence of Serbia, Montenegro and Roumania were recognised...⁴⁶

This statement was an attempt to mollify the feelings of new or enlarged states in Central and Eastern Europe like Roumania and Czechoslovakia, by linking the giving of such guarantees to past practice. The need to mollify the treaty-bound states was necessary because they felt slighted at not being treated as sovereign equals, since big states like Germany which had restive minorities were not subjected to the general League minorities regime. Furthermore, their maturity as democracies or degree of civilisation was impugned, compared with the self-policing of such 'domestic' issues by model states like Switzerland.

45 It is thus important to consider the viewpoints of alternative perspectives. See Jerome Alan Cohen, 'Ethnocentrism and the Teaching of International Law' in *Essays in Honour of Wang Tieya*, R St J Macdonald ed, (Martinus Nijhoff, Kluwer Academic Publishers 1993) 191-199; M Shahabuddeen, 'Developing Countries and the Idea of International Law' in *Essays in Honour of Wang Tieya*, R St J Macdonald ed, (Martinus Nijhoff, Kluwer Academic Publishers 1993) 721-736; Surakiart Sathirathai, 'An Understanding of the Relationship between International Legal Discourse and Third World Countries' (1984) 25 *Harvard Journal of International Law* 395-419. See also the Symposium on Developing World Perspectives in the Summer 2000 vol of the *Harvard International Law Journal*.

46 Letter addressed to M Paderewski by the President of the Conference M Clemenceau transmitting to him the Treaty to be signed by Poland under Art 93 of the Treaty of Peace with Germany (Paris 24 Jun 1919), Reproduced in Appendix IV, HWV Temperley, *A History of the Peace Conference of Paris Vol V Economic Reconstruction and Protection of Minorities* (Oxford University Press, 1969) at pp 432 to 437.

Indeed, international law was utilised to sustain the colonial enterprise, providing a basis for legitimating the extension of sovereignty of colonial powers over territories in Asia, Africa and Latin America. For example, the acquisition of territory or control over colonial territories was justified on the basis of establishing trust relationships with backward peoples and territories, pursuant to the European civilising mission. This was expressed through the legal concept of the sacred trust of civilisation, given expression through the colonial policy that the colony was held under a dual mandate. That is, in exercising governing powers, the colonial power was both international trustee to the interests of dependent peoples and the international community.⁴⁷ Inherent within this idea was that of a civilisational bias operating on the basis of superior or advanced western civilisation and backward territories and peoples who needed to come under a period of colonial tutelage or guardianship so that the benefits of European civilisation could be extended to them. There was no self-consciousness about asserting the superiority of one civilisation over another.⁴⁸ A report presented at the 1884-1885 Berlin Conference, which effected the African Partition to which no African ruler was party, reflected the opinions of 'civilised' states in stating with respect to the indigenous population:

...who, in the present state of affairs, are scarcely qualified to defend their own interests and states that the Conference has thought proper to assume the role of official guardian...[T]he duty to aid them to attain higher political and social status, the obligation to instruct and initiate them into the advantages of civilization are unanimously recognized...No dissent manifested itself, nor could manifest itself, in this respect in the Commission.⁴⁹

47 FD Lugard, *The Dual Mandate in British Tropical Africa*, (London: Frank Cass & Co, 1965).

48 Books were written about backward lands or wards within a context where guardianship or tutelage was thought necessary and justified colonial possessions. See MF Lindley, *The Acquisition and Government of Backward Territory: being a treatise on the law and practice relating to colonial expansion* (New York: Negro University Press, 1969); Charles G Fenwick, *Wardship in International Law* (Washington: Government Printing Office, 1919). On the idea of international law being used to promote a civilisational standard, see Gerritt Gong, *The Standard of Civilisation in International Society* (Oxford: Clarendon Press, 1984).

49 20 HR Exec Docs (1884-1885), No 247 (48th Cong, 2nd Sess) at 83, quoted in Charles H Alexandrowicz, 'The Juridical Expression of the Sacred Trust of Civilisation', (1971) 65 *AJIL* 149-159 at 155.

This sacred trust was later embodied in article 22 of the 1920 League of Nations Covenant.⁵⁰ Article 22(1) and (2) read:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

Thus, the mandate system was predicated on the assumed need of politically underdeveloped mandatory states for tutelage. The article goes on to provide that the degree of tutelage required would vary with the stage of development of the people, with a greater degree of government required for politically immature and under-developed mandated communities. A distinction based on gradated civilisation was drawn between 'A', 'B' and 'C' mandates. 'C' mandates were the least civilised ones who were 'best administered ... as integral portions of [the Mandatory's] territory while the most civilised ones were 'A' mandated territories whose 'existence as independence nations can be provisionally recognised...until such time as they are able to stand alone'. Thus, the League mandate system adopted an implicit model of civilised statehood to determine potential candidates' fitness for independence. The ostensible long-term goal was to prepare mandated communities, through tutelage under a 'civilised' mandatory state, for independence. Admission into the League was conditioned on becoming sufficiently 'civilised', which included securing sufficient protection for racial-religious minorities.

Thus, Iraq, an 'A' mandate, took eight years to attain statehood and join the European club of state or family of nations in October 1932 as a fellow League member. This was conditioned on the giving of certain guarantees and fulfilling certain conditions laid down by the Permanent Mandates Commission at its 20th session, before a mandate

50 Charles H Alexandrowicz, 'The Juridical Expression of the Sacred Trust of Civilisation' (1971) 65 *AJIL* 149-159. See generally, Quincy Wright, *Mandates under the League of Nations* (Chicago, Illinois: The University of Chicago Press, 1960).

could be terminated. Aside from having a settled government and judicial infrastructure, a mandated territory had to issue certain guarantees, including undertaking to ensure the effective protection of racial, linguistic and religious minorities,⁵¹ to meet the standard of a 'European' model of civilised statehood. In considering Iraq's capacity for self-government, the PMC had some concern over how minorities like the Kurds and Assyrians⁵² would be treated. However, Britain's declared conviction that Iraq would treat Assyrians generously influenced the League Council's final decision. To become a League member, it was sufficient that Iraq issued a declaration concerning minority protection.⁵³ The Assembly President, described Iraq's entry into the League as a triumph of the 'supreme virtues of liberalism'.⁵⁴ It evidenced the success of the civilising mission under the mandates system, the discharge of the white man's burden. After a period of 'necessary apprenticeship', Iraq attained the civilised statehood standard.

Notably, under the auspices of the United Nations during the era of decolonisation which proceeded apace from the 1960s, swelling the ranks of Afro-Asian UN members, no gradations of civilisational maturity was evident in the primary instruments relating to decolonisation and the right to self-determination. The 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples⁵⁵ declares that 'all peoples' have the right to self-determination, calling for 'immediate steps' to transfer powers to peoples of territories not yet independent, rather than requiring a period of tutelage. Furthermore, 'inadequacy of political, economic, social or education preparedness should never serve as a pretext for delaying independence' This reflected the growing anti-colonialist sentiment and hostility towards the making of invidious legal distinctions on a peoples' cultural dignity and stage of development before according them independence.⁵⁶

51 *League of Nations Official Journal* (1931), 2057-2058; PMC Mins, 21, 223.

52 See Anthony D'Amato, Ch 18 'The Assyrians Case for Autonomy' in *International Law and Political Reality*, Collected Papers Vol One (The Hague/Boston/London: Kluwer Law International, 1995). Assyrian groups sent numerous petitions to the League in claiming autonomy and recognition as a millet: PMC Opinion *League of Nations Official Journal* (1932) Annex 1418.

53 The Iraq declaration (*League of Nations Official Journal* (1932), 1347-1350) was similar to those given by states applying for League membership a decade before. On Iraq's road to statehood, see Luther Harris Evans, 'The Emancipation of Iraq from the Mandates System' (1932) 26 *American Political Science Review* 1024-1049.

54 Monthly Summaries, League of Nations, (Oct 1932) Vol XII, 'Legal and Constitutional Questions: Admission of Iraq to the League', 276-279.

55 GA Res 1514 (XV), 15 UN GAOR Supp 16, 66.-

56 Berman, *supra* note 37, at 38-39.

Interestingly, contemporary policies of conditional recognition for admission as states in certain contexts reflect the goal of promoting certain standards of domestic governance, the contemporary version of a standard of civilisation. For example, prospective applicants wishing to join the European Union in the aftermath of the dissolution of Yugoslavia were required to constitute themselves on a democratic basis with respect for the rule of law, democracy, human rights and minority protection. This was to be in accordance with European standards found in such documents as the 1975 Helsinki Final Act, the 1990 Charter of Paris for a New Europe and the UN Charter.⁵⁷ In effect, the EU policy of recognising states was used as a tool to attempt to introduce standards of government legitimacy beyond that of effectiveness and independence. It expressed a value judgment with respect to how the new state should be organised, preferring democratic pluralism over xenophobic, uni-cultural nationalism. This latter day willingness to make explicit cultural judgments in favour of certain values is also evident in the discussion of trusteeship proposals for states like Cambodia, Bosnia, Somalia and Haiti.⁵⁸ The important point to note is that international law and international legal policy is not neutral but seeks to promote a certain set of values, although there may not be universal consensus on what these are.⁵⁹ It is important to be explicit about what these values are, so as to engage in constructive debate on their merits.

IV. BEYOND WESTPHALIA: INTERNATIONAL LAW IN AN AGE OF GLOBALISATION

While we should be aware of alternative histories⁶⁰ telling the story of how political communities inter-related beyond the European historical

57 See the Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union and a Declaration on Yugoslavia issued on 16 Dec 1991, (1992) 31 ILM 1485.

58 Berman, *supra* note 56. See Steven Ratner, 'Saving Failed States' (1992) 89 *Foreign Pol'y* 3 and Ruth Gordon, 'Saving Failed States: Sometimes A Neocolonialist Notion' (1997) 12 *Am UJ Int'l L & Pol'y* 903.

59 It is easier to find regional consensus towards certain values. For example in Europe, Section 3, Statute of the Council of Europe, ETS No 1 speaks of the devotion of the peoples of member states to 'the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'. The Parliamentary Assembly monitors the promotion of these values, for example.

60 Onuma Yasuaki, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective'

narrative that forms the dominant setting for the initial development of international law, one still has to start somewhere in terms of teaching. For practical purposes, textbooks that are utilised in Asian law schools tend to be authored by Western scholars.⁶¹ Perennial staples include textbooks authored by Ian Brownlie,⁶² JG Starke,⁶³ Michael Akehurst,⁶⁴ DJ Harris,⁶⁵ and relative newcomers like Martin Dixon,⁶⁶ Malcolm Shaw⁶⁷ and Antonio Cassese.⁶⁸ Unsurprisingly, the material contained or discussed has a bent towards state practice in the Anglo-American world. Nevertheless, this can always be supplemented to demonstrate to the student the relevance of international law to events closer to home. Also, to highlight the influence of forces like globalisation, democratisation and nationalisation upon the structure of the international legal system.

As a pedagogical method, requiring a reading and discussion of the 1648 Treaty of Westphalia⁶⁹ is beneficial in various respects. The student is given an opportunity to become familiar with what has been called the Westphalian model of international society – that of co-equal territorial entities (states) as the basic organising principle of international law. Hence, the student is better placed to appreciate the context of the dissolution of the Holy Roman Empire as the background to the ascendancy of the Westphalian model. This locates what has conventionally been

(2000) 2 *Journal of the History of International Law* 1-66; Jeremy A Thomas, 'History and International Law in Asia: A Time for Review' in *Essays in Honour of Wang Tieya*, R St J Macdonald ed, (Martinus Nijhoff, 1993, Kluwer Academic Publishers) 813-857.

61 An exception is Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Paris: UNESCO: Dordrecht; Boston: M Nijhoff Publishers; Norwell, MA, USA Kluwer Academic Publishers, 1991). See generally, 'Symposium: A Colloquium on International Law Textbooks in England, France and Germany' (2000) 11 *EJIL* No 3.

62 *Principles of Public International Law*, 5th ed, (Oxford: Oxford University Press, 1998).

63 *Starke's International Law* (London/Boston: Butterworths, 1994) 11th ed, Ian Shearer.

64 *A Modern Introduction to International law*, 6th ed, (London; Boston: Allen and Unwin, 1987); a new edition was authored by Peter Malanczuk, *Akehurst's modern introduction to international law*, 7th revised ed, (London: Routledge, 1997).

65 *Cases and Materials on International Law*, 5th ed, (London: Sweet & Maxwell, 1998).

66 *Textbook on international law*, 4th ed, (London: Blackstone Press Ltd, 2000).

67 *International law* 4th ed, (New York: Cambridge University Press, 1997).

68 *International law*, (New York: Oxford University Press, 2001).

69 This is readily available on the web: see The Avalon Project at the Yale Law School at <http://www.yale.edu/lawweb/avalon/westphal.htm>.

considered the 'starting point' of modern international law within its particular European context, embodying an attempt to manage the problems extant in the aftermath of a bloody war in terms of protecting religious minorities, solving boundary disputes, restoring trade privileges etc....⁷⁰ One might also consider the extent to which other significant 'moments' in international law, ushering in the promise of a new system of international relations, has in fact altered the international legal structure. For example, these might include the adoption of the Covenant of the League of Nations in 1919, the United Nations Charter in 1945, the call for a New International Economic Order articulated within UN majoritarian bodies in the 1970s and allusions to a post Cold War 'New World Order' in the 1990s.

The Westphalian model also serves as a reference point from which to consider developments diverging from 'classic' international law, in terms of the expanding range of participants qualifying as international persons, the challenges to state sovereignty from 'above' in relation to international regulatory regimes like the World Bank, the European Union and the phenomena of 'globalisation',⁷¹ and from 'below' in relation to self-determination claims and the extent to which, perhaps in response to democratisation and nationalism, international law seeks to regulate domestic governance.⁷² States then, are not hermetically sealed billiard balls existing in isolated splendour, but are pervious to both external and internally driven influences.

Adopting a functional approach, the quality and nature of the international legal system can be evaluated in terms of how effectively legislative, adjudicatory and enforcement functions are performed and through what modes, whether unilateral or multilateral. It is instructive to consider what Dworkin considers to be the essential components of a legal system as a useful framework in evaluating the quality of the international legal system and to orient our teaching and research in this field. He argues that a general theory of law must be both normative and conceptual and needs to have a theory of legislation,

70 See Leo Gross, 'The Peace of Westphalia 1648-1948' (1948) 42 *AJIL* 20-41.

71 See generally, Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *EJIL* 435. For a reply, see Shirley V Scott, 'International Lawyers: Handmaidens, Chefs, or Birth Attendants?' A Response to Philip Alston (1998) 9 *EJIL* No 4, 750; Adelle Blackette, 'Globalization and its Ambiguities: Implications for Law School Curricular Reform' (1998) 37 *Columbia J of Transnational Law* 57; Peter J Spiro, 'Globalization, International Law and the Academy' (2000) 32 *NYUJILP* 567-590.

72 See generally, Symposium: 'The Changing Structure of International Law Revisited' (1997) 8 *EJIL* No 3; (1998) 9 *EJIL* No 2.

adjudication and compliance.⁷³ A theory of legislation must contain a theory of legitimacy, which describes how laws are validly made. From this framework, we can consider the impact of non-traditional 'sources' like non-binding international organisation resolutions on the body of international law norms. It must also contain a theory of legislative justice, which throws into sharp relief the types of law that ought to be made. This line of enquiry can be used to frame the competing interests of capital exporting and importing states through such matters as the project of constructing a new international economic order. In relation to a theory of adjudication, a theory of controversy speaks to which standards a judge should use to decide hard cases at law. This can be utilised to illustrate the difficulty in reconciling competing international legal principles, such as territorial integrity and the right to self-determination expressed through statehood claims beyond the colonial paradigm. Indeed, to show the extent to which international law has a role in deciding international disputes. The World Court, for example, in giving advisory opinions cannot deal with political questions, which are considered to be non-justiciable.⁷⁴ Indeed, ICJ judgments have been criticised for over-reliance on non-binding resolutions to find a customary international norm in the absence of sufficient practice, which highlights the problem of the sources of law the Court may base its decisions on.⁷⁵ A theory of jurisdiction relates to why a certain body should hear a particular dispute, a difficult issue in international law where jurisdictional claims tend to be relative and overlapping, particularly in relation to matters like universal crimes. Lastly, a theory of compliance needs to explain, under a theory of deference, essentially why law is binding or why there is a duty to obey. This takes us to the heart of jurisprudential issues regarding the binding nature of international legal obligations. A theory of enforcement relates to the goals of enforcement and punishment and reactions to different categories of crime or fault. For example, in punishing a torturer or terrorist assuming that this falls within the category of *hosti humani generis*, the intent is to ensure that enemies of mankind, whose acts implicate the public interest, should be called to account. Notably, the latest version of the International Law

73 Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), at vii to viii.

74 Art 65(1) of the Statute of the International Court of Justice empowers the Court to give advisory opinions on 'any legal question'.

75 See, eg, the *Nicaragua case (Nicaragua v United States)* ICJ Rep 1986 14. This case is critically appraised in a series of articles found in (1987) 81 *AJIL*.

Commission's Draft Articles on State Responsibility does not refer to 'international crimes' as opposed to international delicts. Nevertheless while appearing to deal with a unitary conception of an 'international wrong', it still recognises that the breach of certain international wrongs, because of the gravity of the interest involved, entails more onerous consequences.⁷⁶

Given the increasing density and sheer scope of international norms, one may track the contemporary development of substantive legal norms and critically evaluate their interaction with classic principles of international law, *eg*, the interaction of territorial jurisdiction and extra-territorial antitrust laws. The public-private divide, which delineates appropriate spheres of international regulation, is shifting as the concept of the reserved domain or domestic jurisdiction is not fixed, being an 'essentially relative question' depending on the 'development of international relations'.⁷⁷ A state cannot exclusively regulate antitrust, environmental and labour policies in the light of globalisation of trade and finance, and is increasingly subject to more substantive constraints in terms of state freedom of action. An indication of the expanding scope of international law is evident from a cursory examination of the United Nations Millennium Summit Declaration,⁷⁸ which indicates that matters of international concern span topics from peace, security, disarmament, to development and poverty eradication, environmental concerns to human rights, democracy and good governance.

We do not live in a Hobbesian version of international society where states basically co-exist, with a minimalist set of rules and where the law serves as a 'fence' to delimit the scope of state jurisdiction and power and to preserve law and order. Nor do we live exist in a Kantian 'cosmopolitan' vision of a pacific federation which is non-statist in orientation, with transnational links built between civil society, NGOs, individuals and groups across physical frontiers. It is fair to observe that in the contemporary setting, there are increased demands for co-operation among states which engage in more intensive and extensive co-operative schemes where domestic regulation or efforts alone do not suffice, *eg*, co-operation to manage transnational crime or environmental hazards. There are signs of solidarity and a 'law of co-

76 Arts 40-41, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, provisionally adopted by the Commission on second reading (A/CN.4/L.602/Rev.1).

77 *Nationality Decrees issued in Tunis and Morocco case*, Advisory Opinion PCIJ Rep, Ser B, No 4 (1923).

78 GA Res 55/2 (6-8 Sep 2000).

operation' though one might differ as to whether the Grotian moment has arrived or is arriving.⁷⁹ There is clearly a growing appreciation of the interdependence of relations on our common planet. That is, of the inter-connected rather than discrete nature of matters like forestry practices in the Brazilian rainforest, the global concern of bringing dictators who engage in torture practices into account and how domestic economic policies can affect markets abroad. The cross-cutting nature of issues is evident in broader understandings of 'security' within both global organisations like the UN or regional organisations like the OSCE which calls for proactive rather than reactive measures. 'Security' encompasses non-military sources of war in the socio-economic, ecological and humanitarian fields:

We face serious challenges, but we face them together. They concern the security and sovereignty of States as well as the stability of our societies. Human rights are not fully respected in all OSCE States. Ethnic tension, aggressive nationalism, violations of the rights of persons belonging to national minorities, as well as serious difficulties of economic transition, can threaten stability and may also spread to other States. Terrorism, organized crime, drug and arms trafficking, uncontrolled migration and environmental damage are of increasing concern to the entire OSCE community.⁸⁰

At the dawn of the new millennium, the world community is faced with the challenges of managing tribalism and capitalism, the continuing threats posed to international peace and security and global welfare. We are apparently separated by cultural and economic divides captured in the terms 'clash of civilisations' or the 'north-south' divide, but the international community is as much a product of commonalities as it is of differences. Law, international law, embodies a framework of shared values, practices, with institutions and processes to mediate between competing interests. While what is termed the 'global public interest' may be captured by particular interests, international law may serve as a vehicle for facilitating competing interests and genuine joint ventures. In the teaching of this subject in Asian universities, we should consciously articulate the major concerns extant in our

79 See Georges Abi Saab, 'Whither the International Community?'; Bruno Simma & Andreas L Paulus, 'The International Community: Facing the Challenges of Globalization'; Pierre-Marie Dupuy, 'International Law: Torn between Coexistence, Cooperation and Globalization', all in (1998) 9 *EJIL* 248-286.

80 *Lisbon Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-First Century*, OSCE Lisbon Summit, 2-3 Dec (1996), para 2.

corner of the globe as we touch base with the descriptive, analytical and prescriptive, without forsaking aspirations towards a common humanity and our common destiny as peoples of the world. In this lifetime, we have to deal with the ambivalence, reflected in international society, between universalist visions of humanity and the wry observation that 'if all men are brothers, the ruling model is Cain and Abel.'⁸¹

81 Arthur Leff, 'Unspeakable Ethics, Unnatural Law' (1979) *Duke Law Review* 1229 at 1249.