THE ROLE OF POSITIVISM IN THE DEVELOPMENT OF INTERNATIONAL LAW*

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INTRODUCTION

There are varying schools of thought in relation to theories regarding international law. Every school of thought has tried to establish an overarching reasoning behind the origin and development of international law. From the early inception of international law until today, the question as to its very nature and source has been and continues to be the source of much contention and debate.

Some of the naturalist theorists support the view that international law is nothing but "the natural law of the states."[1] This simply means that the law of nature governs reciprocal relations between the states. The positivist view differs fundamentally from the naturalist view in that it ascribes the growth of international law to custom and treaties.[2]

It is submitted that the law of nature played a vital role as a fundamental source of the law in the form of necessity at one point in time. To a limited extent, it is still recognised that natural law possesses this role; however, it is near impossible to find a law that has its basis exclusively in human reason, above legislation and customary law.[3] In the contemporary context, it can be seen that treaties, conventions, and customary rules are the "backbone" of international law.

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[1] Alfred Verdross & Heribert Franz Koeck, *Natural Law: The Tradition of Universal Reasons and Authority, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 32 (J. MacDonald & D.M. Johnston eds. 1983).

[2] M.P. TANDO, PUBLIC INTERNATIONAL LAW 33 (12th ed. 1969).

[3] L.F.L. Oppenheimer, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L. L. 329 (1908).

Contemporary international law has evolved due to the above-mentioned influences. The science of international law can be identified purely based on these elements. At present, international relations in the form of treaties and customs are heavily relied upon.

This paper will examine how international law has gradually and systematically developed. In relation, the following shall be discussed: the historical evolution of international law, the law of nature as a basis of international law, the emergence of positivism, and legal positivism and its role in the progressive development of international law. The weaknesses of positivism shall also be considered in this paper. In conclusion, the paper will make the submission that positivism must continue to play an important role in order to safeguard and ensure the further development of international law.

HISTORICAL EVOLUTION OF INTERNATIONAL LAW

The meaning of international law as it is understood in modern times did not exist during antiquity or in the first part of the Middle Ages. During this period, the modern concept of the state did not exist. Instead, people were divided into various ethnicities and communities. They were largely independent of each other although there was some interaction between the various groups. There did exist some rules and customs that governed their interaction, which included the special protection and privileges afforded to ambassadors, the respect and adherence accorded to treaties, and the rules and usages of war. These elements were evident many centuries before Christianity in the ancient Indian and Egyptian kingdoms.[4]

In India, the ancient Hindu kingdoms were divided into various parts whose relations were governed by different rules and customs. With respect to certain matters such as the declaration of war, it was "forbidden to kill or wound enemy person who had surrendered"[5] and the *duta* or ambassador was inviolable.

In Jewish territory, the Jews faithfully observed the treaties and considered ambassadors as sacrosanct. The law for foreigners residing on

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[4] J.G STARKE, INTRODUCTION TO INTERNATIONAL LAW 8 (10th ed. 1989).

[5] *See supra* note 2, at 27.

Jewish land was the same as for themselves, that is, "love… the stranger: for ye were strangers in the land of Egypt."[6]

In Greece, city-states were small but independent of one another. The Greeks developed customary rules governing relations between the various Greek states, such as the inviolability of heralds in battle,[7] the need for a prior declaration of war, and the enslavement of prisoners of war.[8]

The Romans had a progressive concept of international law. In the period of Roman dominance of the antiquity, the rules which governed the relations between Roman citizens and foreigners were considered *jus gentium.* They had great respect for treaties. Treaties were divided into three kinds: (1) treaty of friendship, (2) treaty of alliance, and (3) treaty of hospitality.[9]

These rules may have been quite rudimentary[10] and not comparable to the modern system of international law as we know it today; nevertheless, they have made a significant contribution to the law of nations. In support of this, Oppenheim states that "though this treatment can in no way be compared to modern international law… it constitutes contribution to the law of nations of the future in so far as its example furnished many agreements to those to whose effort we owe the very existence of our modern law of nations."[11]

In the Middle Ages, political conditions were not favourable in order for universal norms to thrive. There was much internal disorder in Europe as Europe was not divided into independent states in the modern sense. There was no undisputed political control, and therefore a law of nations was notpresent.[12] There were two matters which impeded the development of a system of international law:

i. The temporal and spiritual unity of Europe under the Holy Roman Empire which, although to some extent was notional, was belied by numerous instances of conflict and disharmony.

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[6] *Id.*

[7] *Id.*

[8] *See supra* note 4, at 27.

[9] *See supra* note 5.

[10] M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 12 (6th ed. 1987).

[11] *See supra* note 4, at 77.

[12] *Id.* at 9.

ii. The feudal structure of Western Europe was dependent on a hierarchy of authority, which not only hampered the emergence of independent states, but also prevented the powers of the time from acquiring the unitary character and authority of modern sovereign states.[13]

In the 15th and 16th centuries, there was remarkable development in Europe. The Renaissance influenced a religious revolution which threatened the political and spiritual unity and destabilised the very foundation of medieval Christendom.[14]At this time, the Holy Roman Empire disintegrated. The void it left was filled by a growing number of independent states.[15] These changes resulted in instability and war in Europe. Modern international law was conceived and born out of the need to promote international peace and harmony.[16]

Modern international law began to develop at the same time as the modern system of states, rising from the ruins of the Holy Roman Empire in the 16th and 17th centuries. The turning point was the inception of modern international law commonly attributed to the Peace of Westphalia in 1648.[17] This treaty was a landmark treaty as it established international law "as a logical philosophy, handmaiden of statehood and the cultural heir of religious Principle."[18] Before 1648, international law texts were inconsistent and incoherent.[19]

The modern system of international law is a product, roughly speaking, of the last 400 years,[20] which originated in Europe and developed through the intellectual writing and thinking of early writers and jurists. Their ideologies were a great influence during the formative period of international law. The world legal order has been enriched by their contribution, and even today their work and influence on contemporary international law can still be identified.

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[13] *Id.*

[14] *Id.*

[15] L. HENKIN, G. PUGH, O. SCHACHTER & W. SMITH, CASES AND MATERIALS ON INTERNATIONAL LAW 2 (1980).

[16] M.M WALLACE, INTERNATIONAL LAW 4 (2nd ed. 1992).

[17] David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 19 (1988).

[18] *Id.*, at 14.

[19] *Id.*, at 17.

[20] *See supra* note 4, at 19.

INTERNATIONAL LAW AS LAW

It is argued by some commentators that international law is not really law. In support of this view, they point to some elements which do not meet the requirements of the character of a law: (1) it has no competent legislative authority, (2) it has no strong law enforcement machinery, and (3) there is lack of certainty.

John Austin (1790-1859) was one of the greatest legal philosophers of the 19th century. His view was that law comprised a series of commands or orders issued by a sovereign and backed by the threat of sanctions if the commands were disobeyed. Austin classified the rules into three categories: divine law, positive law, and positive morality.[21] His view was that "international law" is not "positive law" because it does not result from the commands of a sovereign,[22] but rather from a "positive international morality".[23]

Following Austin's view as well as numerous 19th century legal philosophers, such as Hobbes, Holland, and Salisbury, denied that international law was in fact a law. However, these philosophers faced strong opposition in Kelsen, Hall, Lawrence, Oppenheim, and Starke, who saw international law as true law in spite of some inherent weaknesses.

According to Kelsen, "it is quite possible to consider international law as real law, since it contains all the essential elements of legal order."[24] Oppenheim maintained that for the existence of law three essential conditions were necessary: (1) a community, (2) a body of rules for human conduct within the community, and (3) the common consent of that community that these rules should be enforced by an external power.[25] According to these theorists, international law fulfils all of these requirements.

In the contemporary context, one can argue that there is no scope to deny the legal nature of international law. The United Nations Charter ("UN

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[21] *Id.*, at 17.

[22] MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 13 (2nd ed. 1991).

[23] *See supra* note 4, at 18.

[24] Hans Kelsen, *The Pure Theory of Law: An Analytical Jurisprudence, in* LEGAL POSITIVISM 111 (Mario Jori ed. 1992).

[25] *See supra* note 4, at 10.

Charter") has recognised the legal nature of international law. Article 1(a) of the U.N. Charter states:

> To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law.[26]

Even now countries such as the United States of America give constitutional validity to international law and treat it in practice as a part of the law of their land. In the *Paquete Habana* case, Justice Gray stated that "international law is part of our law, and must be ascertained and administered by the court of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[27]

It is evident that there are some inherent weaknesses in international law as it is less explicit than state law, but despite this, it satisfies all the ingredients that are required to be deemed a law.

THE LAW OF NATURE AS THE BASIS OF INTERNATIONAL LAW

In relation to the basis of international law, there emerged some schools of thought, namely, natural law and positivism. The natural law doctrine is based on the law of nature. The basic principle of this doctrine is that all law (national as well as international) is derived not from any deliberate human choice or decision but from principles of justice that have a universal and eternal validity.[28] Therefore, the authority and justification for the existence of natural law is considered to derive from a spiritual source outside of human discretion. It is a system of moral rules reflecting the rational nature of man.[29]

In the period of antiquity and also in the Middle Ages, there were many differing theories of natural law. However, the traditional theory of natural law was the dominant theory. This theory was developed by a line of

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[26] U.N. Charter art. 1, ¶ 1.

[27] *See supra* note 4, at 13.

[28] *See supra* note 10, at 13.

[29] H. Bull, *Natural Law and International Relations*, 5 BRIT. J. INT'L. STUD. 174 (1979).

Greek and later, Catholic theorists who contended that natural law had an ontological-teleological and metaphysical basis. They also maintained that, in order for it to be a good law, it must be in harmony with the essential nature of man.[30]

According to the natural law theory, God created man and the social nature of man and, as a corollary, these laws are binding upon all human beings. By way of this reasoning, there emerged a principle that, since the law of nature derives its binding force from God, man as a social being and a consequence of His creation is endowed with a duty to recognise these principles. This is also binding upon the states as a divine order.[31] The mutual relations between the states is governed by these divine orders, therefore no law other than natural law governs state relations as it is superior to other norms.

According to history, from an early stage the law of nature played a significant role in international law. International law has been greatly influenced by the early naturalists. Their philosophical thoughts are evident in the formation and development of international law. Early theorists who greatly influenced international law were the Spanish theologian, Francesco de Vittoria (1480-1546), Suarez (1548-1617), an Italian Protestant who fled to England, Gentili (1552-1608), the scholar and jurist, the Dutch scholar and diplomat Hugo Grotius (1583-1645), and the Englishman, Zouche (1590-1661). Most notable, however was Samuel von Pufendorf, a natural law philosopher and professor of the Law of Nature at the University of Heidelberg.

It is notable that there are many differing opinions amongst the naturalists; however they all concur on the divine originality of the law of nations. This was the predominant philosophy until the 16th century. In this century, there emerged some changes in the character of natural law. The development was lead by Grotius, who wrote the first treatise on international law, *De Jure Belli ac Pacis*.[32] He argued that natural law would still be valid even if there were no God.[33] He secularised the natural law concept and considered that the existence of natural law was the automatic consequence of the fact

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[30] J. Kunz, *Natural Law Thinking in the Modern Science of International Law*, 55 AM. INT'L L.J. 951 (1961).

[31] *See supra* note 1, at 32.

[32] *See supra* note 30, at 951.

[33] *Id.*, at 952.

that man lived together in society and was capable of understanding that certain rules were necessary for the preservation of society.[34]

As a rationalist, Grotius argued that law is the dictate of reason, that the principles of the law of nature are derived from universal reason rather than divine authority.[35] He made a distinction between natural law and the law which derived from the will of God or man. In support of this argument, he used Biblical quotations and references from Greek and Roman history, even drawing out some reasoning from parallel cases in Roman private law. In this method, there is evidence of some elements of positive thinking.

After Grotius, Zouche as well as Vattel (1714-1767), a Swiss jurist and professor of civil law at Oxford University, also became influential proponents of early positivist theories. Without denying the existence of natural law, Zouche emphasised the customary law of nations which he called *jus inter gentus*.[36] Vattel acknowledged natural law but he considered all the more the proposition that international law is derived from the will of nations, a presumed consent expressing itself in treaties or customs.[37] In this context, it can be said that these philosophies paved the way for legal positivism.

THE EMERGENCE OF POSITIVISM

It was evident at this stage that the philosophy of international law began to change dramatically. Natural law philosophy began to lose legitimacy as the absolute source of international law. This situation opened the door for a new philosophy of international law. By the beginning of the 18th century, legal philosophers began to argue that law should be viewed as a set of legal norms and that international law as law has to be treated as a legal norm in itself. Law is man-made. Being man-made, it might vary depending on the whim of the legislator. This paved the way for the view that the law is a device for transferring authority and legitimacy by means of rules.[38] This philosophy is known as positivism.

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[34] *See supra* note 10, at 13.
[35] *See supra* note 16, at 4.
[36] *Id.*, at 5.
[37] *Id.*
[38] MARIO JORI, LEGAL POSITIVISM xv (1992).

LEGAL POSITIVISM

Positivism is a general philosophy. This term is broadly used as the opposite of natural law. It is an approach to problems of legal philosophy and jurisprudence by applying the principles of empirical, anti-metaphysical philosophy.[39]

In the 16th, 17th, as well as the beginning of the 18thcenturies, there emerged a distinctive contrast between the naturalists and positivist theories. As the positivist philosophy was related to anti-metaphysical facts, it was accorded more recognition between the two.

From the 18th century, in particular, from Vattel onwards, there was no doubt that international law had become predominantly positivist in nature. From the outbreak of the First World War in 1914, international trade and communication began to increase dramatically and the use of customs and treaties also increased as a suitable way for international relations to develop. Positivism became the cornerstone of international law due to the authority accorded to customs and treaties.

Natural law philosophy was based on an empirical concept of positivism. It gained wide support from a number of international jurists and writers in the 18th centuries. This philosophy came to regulate the actual behaviour and interaction of states with each other. It emphasised what states should actually do rather than what the law of nature supposes they should do.[40] It advocated only those norms of international law which are recognised by international practice;[41] that customs and treaties were the only sources of international law; and that international relations should not be conducted on the basis of theological and metaphysical principles.

The shift from natural law to positivism in the international legal arena came about gradually through the increasing emphasis on the voluntary law of nations built up by state practice and customs.[42] Positivism emerged in the beginning of the 18th century and became more influential in the last quarter of the 19th century. The shift towards positivism was due to the contributions of

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[39] A.L.F Ross, *Validity and Conflict between Legal Positivism and Natural Law*, *in* LEGAL POSITIVISM 166 (Mario Jori ed. 1992).

[40] *See supra* note 22, at 15.

[41] *See supra* note 1, at 31.

[42] *Id.*

some eminent jurists, most notably Moser (1701-1785), Martens (1756-1821), and Bynkershoek (1673-1743). This philosophy originated from a practical point of view and played a vital role in the systematic formulation and the later development of international law, the influence of which still resonates today as modern international law continues to expand, mostly due to adherence in the positivist approach.

Positivism argues that the general consent of states is the basis for the authority and legitimacy of international law. It concentrates on the voluntary law of nations, that is, the customary practices of states and law-making treaties. Positivists defend the existence of positive law of nations as an outcome of customs and treaties. According to them, international law is a conventional law whose validity is derived from a union of wills of sovereign states, which, in turn, is expressed in the form of treaties or state practice.

A fundamental basis of the positivist theory of international law is the idea that law should be man-made and that the creation of law is dependent on practice or consent. As a system of international law, positivism places emphasis on state practice and state behaviour. International law has developed following these approaches and the development of international law is still continuing by this process.

There exists some defects and crude norms in the positivist approach, but despite this, positivism has still attained a significant influence on the development of international law and in the making of a systematic body of rules. If we examine the role of customs and treaties in the creation of law in international legal life, it will be evident that its influence is still crucial and necessary for the further development of international law. International law is growing due to these sources although some intangible sources, such as equitable principles, play a role in this regard to a certain extent. The importance of customs and treaties shall be examined in the following discussion, specifically focusing on the role of customs and treaties in the development of international law.

THE ROLE OF CUSTOM IN THE DEVELOPMENT OF INTERNATIONAL LAW

It is submitted by some legal scholars that law everywhere is derived from custom.[43] Custom played a formative role in the development of international law. Before the last few decades, custom was the prevailing source of international law. In the context of the modern world, the adaptation of numerous treaties recently qualified its role and influence in international law. However, custom still occupies an eminent place in international law; in the majority of norms, it still manages to maintain its significance.

Without reference to the desire of the states, in certain circumstances, custom may obligate states to follow international norms unerringly. An example would be the customary rules automatically extending the ambit of their operation to a newly formed state even though that state never had the opportunity to express its consent to the formation of the rules in question.

In international law, custom is a practice followed by those concerned because they feel legally obliged to behave in such a way.[44] As a source of international law, it is related to state practice. Under Art. 38(1)(b) of the Statute of the International Court of Justice ("ICJ"), international customs are evidence of "a general practice accepted as law."[45] In this way, customary international law developed through state practice.[46] As a necessary consequence, the principles reflected in state practice, expressly or impliedly, are to be considered as a rule of international law if such principles are followed by them in the belief that they consist of binding legal obligations.

For the creation of a rule of customary international law, the ICJ postulates, as particularly enunciated in the *Continental Shelf Cases*, two constitutive elements: (1) the general practice of states and (2) the acceptance by states of such general practice as law.[47] State practice does not become law simply on the basis that it is universally followed or has been followed by the states for a long period of time. State custom is considered to be binding as a matter of law if it is coupled with with *opinio juris*. In support of this, Aekhurst

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[43] Yoram Dinstein, *International Law as a Primitive Legal System,* 19 N.Y.U. J. INT'L L. & POL. 8 (1986).

[44] *See supra* note 16, at 9.

[45] See supra note 10, at 76.

[46] T. BUERGENTHAL & H. G MAIER, PUBLIC INTERNATIONAL LAW 22 (2nd ed.).

[47] H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 46 (1972).

states that "Article. 38(1)(b) of the Court's statute, by providing that practice must be accepted as law, seems to require *opinio juris,* although it leaves the meaning of *opinio juris* uncertain."[48]

In the *Nicaragua Case,* the ICJ stated that "not only must the acts concerned amount to a settled practice, but they must be accompanied by the *opinio juris sive necessitaties".*[49] Either the States taking such action or other states in a position to react to it must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitaties.* State practice and *opinio juris* are complementary to the creation of customary international law. The same approach has been found in the other judgements of the ICJ and its predecessor court, the Permanent Court of International Justice ("PCIJ"),[50] as illustrated in the *Asylum Case* (1950), the *Right of Passage Case* (1960), and the *Lotus Case* (1927).[51]

Not only state practice but the practice of an international organisation can create rules of customary law.[52] It is also available in the decisions of the courts. At present, due to the adoption of large numbers of treaties as well as the codification process, the importance of customary rules has been reduced. Despite this, its contribution to the development of international law is still remarkable.

THE ROLE OF TREATIES IN THE DEVELOPMENT OF INTERNATIONAL LAW

As outlined earlier, there emerged a significant change in international law after the peace of Westphalia around the time the naturalist theories began to lose influence. Rejecting the existence of a natural law, many writers

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[48] M. Akehurst, *Custom as a Source of International Law,* B.Y.I.L. 32 (1975).

[49] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 98 (Jun. 27).

[50] *See supra* note 49, at 32.

[51] Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20); Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6 (Apr. 12); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

[52] *See supra* note 10, at 11.

concentrated on the practice of states as crystallised in treaties and customs.[53] Their view was that treaties and customs were the real source of international law.

Until the end of the 17th century, treaties were not considered a legitimate source of international law, rather they were considered to be a private contract in civil law. The positivist theorist Grotius was the first to acknowledge the importance of treaties in international law. He was the first to undertake the task of a systematic and rational analysis of the Law of Nations.[54] He regarded the Law of Nations as an autonomous discipline, not in terms of a question of moral theology.[55] Hence, one can argue that the treaty emerged as a source of international law due to Grotius.

With the passage of time in the era of positivism, international law began to be regarded as a reflection of the free will of states. During this stage, international law gained in momentum, establishing itself as a systematic body of rules. The modern development of international law continues today through law-making treaties. Only through a treaty is it possible to formulate concrete and clear rules and the reciprocal rights and obligations of the parties as well as regulatory devices to ensure compliance.

There has been a remarkable development of law-making treaties since the middle of 19th century. Between 1864 and 1914, 257 such instruments were concluded.[56] These were concluded according to the new demands of various subject matters such as nationality and statelessness, international waterways, and the Red Cross. It was possible to convey through these instruments an agreement clearly expressed by the parties.

In the era of the League of Nations, several international organisations were established. Due to this, international law was further developed. At this stage, arbitration and other legal avenues were required for the settling of disputes by peaceful means between the states. As a result, a significant number of treaties were established. After the Second World War, a large number of international organisations were established for cooperative

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[53] H.G. de Jong, *Coercion in the Conclusion of Treaties, A Consideration of Articles 51 and 52 on the Law of Treaties*, 15 NETH. Y.I.L. 212 (1984).

[54] B. Vitanyi, *Treaty Interpretation in the Legal Theory of Grotius and its Influence on Modern Doctrine*, 14 NETH. Y.I.L. 43 (1983).

[55] *Id.*

[56] *See supra* note 4, at 42.

purposes. The relationship between states and international organisations has rapidly grown since then. Every year, many treaties are concluded on various matters by the states and international organisations in order to respond to these new demands.

It is not excessive to say that modern international law is expanding through international treaties. Due to the industrial and economic changes as well as the development in national communication systems, treaties are the most effective means of creating international rights and obligations. By means of treaties, world communication systems are developing and embracing all kinds of international agreements in written form. Professor Yasseen described the object of treaties as being "what the parties have done, the norms they have stated, the rights and obligations arising therefrom, where the purpose of the treaty is and what the parties wished to reach."[57]

Since the inception of modern international law, treaties have become the most effective way of establishing relationships between parties. As a suitable method of international relations, many important areas of international law have developed and are still developing under international treaties. Some examples are the Geneva Convention on the Law of the Sea ("Geneva Convention of 1958") (1958), the Vienna Convention on the Law of the Treaties ("Vienna Convention of 1969") (1969), the United Nations Convention on the Law of the Sea ("Law of the Sea Convention of 1982") (1982), and the Convention on Diplomatic and Consular Relations (1963).

For the conduct of states in their mutual intercourse, certain legal norms are necessary, and law-making treaties have established these. Treaties have been concluded under different forms whether between heads of states or interstates but the legal significance of these are the same, which is to lay down specific rules for practice in relation to international transactions.

International conventions create norms of international law, and international relations are conducted following these clearly expressed agreements. According to Professor Tunkin, a treaty is a clearly expressed agreement between states relating to the recognition of a particular rule as a norm of international law or to the change or liquidation of existing norms of international law.[58] Article 38(1)(a) of the ICJ Statute states that an

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[57] *See supra* note 54 at 57.

[58] G. TUNKIN, THEORY OF INTERNATIONAL LAW 91 (1974).

"international convention, whether general or particular, establishes rules expressly recognised by the contesting states."[59]

The aim of international law is for the peaceful coexistence and strengthening of co-operation amongst states. International treaties make a major contribution in this respect as they contain rules which are vital for the above-mentioned development. After the institution of the United Nations ("UN"), the development of international relations encased in international treaties has been considered to be the main method of peaceful settlement. Article 33 of the UN Charter states that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, arbitration, judicial settlement."[60]

In modern times, especially after the establishment of the UN, and the adoption by the United Nations General Assembly ("UN General Assembly") of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), in which most colonial countries gained independence, there emerged as well a number of international organisations. In this context, on the one side, international relations can be seen to be growing rapidly, and on the other side, there still exists many complexities in relation to economic and social concerns. In order to deal with the problems and to develop mutual relationships, numerous international conferences were held and are still being held; various kinds of treaties are still being concluded. At the present time, treaties are concluded not only among states but also between states and international organisations as well as between international organisations themselves.

Article 2(1)(a) of the Vienna Convention of 1969 defines a treaty as "an agreement between the states and governed by international law." This was considered to be quite a restricted definition, which resulted in its redefinition by means of a more recent treaty. The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations ("1986 Convention") (1986) was concluded to complement the Vienna Convention of 1969. Article 2(1)(a) of the 1986 Convention defines a treaty as an international agreement governed by international law and concluded in written form: (i) between one or more states and one or more international organisations, or (ii) between international

[59] I.C.J. Statute, art. 38, para. 1.
[60] U.N. Charter, art. 33.

organisations.[61] This is a significant extension of international agreements and at the same time of the development of international law. In both the preamble of the Vienna Convention of 1969 and the 1986 Convention, the fundamental role of treaties in the history of international relations was recognized. It also acknowledged the consensual nature of the treaties and their ever-increasing importance as a source of international law.[62]

Good faith is vital for the further development of international relations. This is why it is an intrinsic part of the law of treaties.[63] Article 26 of both the Vienna Convention of 1969 as well as the 1986 convention state that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[64]

All treaties are concluded in accordance with the Vienna Convention. They shall be submitted to the United Nations Secretariat for their registration, filing, recording, and publication. By the end of 1985, about 1049 volumes of treaties have been published since the establishment of the UN. The first volume was published in 1947.[65] Before 1973, treaties were registered by manual method. With the dramatic rise of international treaties, the manual method proved to be inadequate for the processing of the large number of treaties. Therefore, in 1973, the UN General Assembly approved the use of computers for treaty registration.[66] If anything, these developments in procedure highlight the greater role of treaties in international relations in the modern world. It further shows that international treaties have become an integral part of international law, an approach espoused by positivists.

To reiterate, positivism argues that treaties and customs are the only source of international law, not ethical norms. Positivists have also defended the authority of treaties and customs in relation to the origin and development of international law through various arguments which were outlined and discussed above.

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[61] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 333

[62] *See supra* note 61.

[63] Tariq Hassan, *Good Faith in Treaty Interpretation*, 21 VA. J. INT'L L. 450 (1981).

[64] *See supra* note 61.

[65] Erik Chrispeels, *Open Diplomacy and Publication of Treaties*, *in* United Nations Juridical Yearbook 97 (1988).

[66] *Id.*

THE SCIENCE OF INTERNATIONAL LAW AND POSITIVISM

Positivism is a doctrine which belongs to the theory of the science of law. It is based on observations and the interpretation of social facts. It asserts purely factual and empirical terms and it applies in particular to the idea of validity. As a "realistic outlook",[67] it has played an important role in the science of international law. As a branch of the science of law, international law must be positive. According to Oppenheim, "if the method of the science of international law is to be positive no rule must be formulated which cannot be proved to be the outcome of international customs or law making treaties."[68]

The science of international law is related to growth. For the further growth and development of international law as a methodology of the science of international law, positivism emphasises that there must be a reasonable criticism of the philosophies which are not conclusive to the development of international law. According to positivism, international law is the outcome of general law-making treaties and customs. Through proper observation that justifies the validity and empirical research of international rules, this philosophy supports the idea of the codification of international law.

At present, states are not the only subjects of international law; international organisations and, to a certain extent, individuals, are also subjects of international law. In this context, the traditional definition of international law has changed. Behind this development are positivist influences such as the establishment of a large number of international organisations and the present movement to protect human rights and fundamental freedoms.

In accordance with the positivist view, some organisations within the UN body play a significant role in calling for the codification and progression of international law. Unlike the municipal sphere of the state, there is no law-making body in the international arena. However, due to the changing demands of society, it is emphasised that in order to meet these new demands, it is necessary to revise old laws and formulate new norms that will gain universal acceptance and fulfil the demands of the international community.

Today, the numerous agencies of the UN like the International Maritime Organization, International Civil Aviation Organization, and International Telecommunication Union are consistently engaged in

[67] *See supra* note 4, at 27.
[68] *See supra* note 3, at 334.

formulating new international conventions and revising old rules.. On the other hand, in relation to the codification and development of international law, the most relevant authority is the International Law Commission ("ILC").

THE ROLE OF THE INTERNATIONAL LAW COMMISSION

The ILC plays a vital role in the structural enunciation and development of international law. It was established by the UN General Assembly in 1947 in order to promote the progressive development of international law and its codification in 1949. Article 15 of the ILC Statute uses the term "progressive development of international law" for the sake of convenience in preparing draft conventions on subjects which have not yet been regulated by international law or in regards to which law has not yet been sufficiently developed in the practice of states. Similarly, the expression "codification of international law" is used for convenience to refer to the more precise formulation and systematisation of rules of international law in fields where there already has been extensive state practice precedent and doctrine.[69]

Since 1949, the ILC has dealt with many areas of international law and modified them in response to the ever-changing demands of theinternational community. The major contribution of the ILC in this respect has been the Vienna Convention of 1969, the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963); the Geneva Convention of 1958, and the Law of the Sea Convention of 1982.

For the development of international law, the consensus of the international community is necessary. In determining the appropriate norms, international consensus is taken into account by the ILC. However, just because there is consensus does not mean that areas of disagreement can be avoided, for, as Lauterpacht has observed, "the disclosure of disagreement" is the first step towards agreement but disagreements must be such as may be resolved without touching sensitive political issues.[70]

The ILC is engaged in the systematisation and precise formulation of areas of international law that are of value to the international community as a whole. This also assists in the creation of customary rules creating an inter-

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[69] Statute of the International Law Commission 3 I.L.C. Yearbook (1982).

[70] Edwin Hoyt, *The Contribution of the International Law Commission*, 59 AM. SOC'Y. INT'L .L. PROC. 8 (1965).

relationship between treaty and customary rules. In spite of some of its limitations, the role of the ILC is significant because its function is to identify the international norms that keep with the overarching spirit and expectations of the international community.

THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

It is a truism that international law is expanding at a rapid rate due to the various treaties that have been concluded in different areas, creating new fields of application and cementing the eminence of international law. The ICJ has played a major role in this development.

From its very inception, the ICJ has unhesitatingly given express recognition and encouragement of developing international law in various areas and has emphasized the relevance of that factor in the determination of the law applicable to particular cases.[71] In the *Barcelona Traction Case,* the Court observed that "in seeking to determine the law applicable to this case the court has to bear in mind the continuous evolution of law."[72]

By the end of 2006, the work of the ICJ has yielded more than 60 judgements and 23 advisory opinions. Through the interpretation of treaties and the various judgements and opinions, it has played and continues to play a significant role in the development of the various branches of international law.[73] The *Gabcikovo-Nagymaros Case* between Slovakia and Hungary, regarding the protection and preservation of the natural resources in the Danube River, is one of the recent examples in this respect.

In considering cases of dispute, the ICJ gives precedence to the positivist approach. According to Art. 38 of the ICJ Statute, international treaties are given preference over other sources in guiding the ICJ in settling disputes. Besides the application of customs as a rule of international law, judicial recognition is given to customary rules. It has described this in its manual from 1976, as follows:

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[71] N. Singh, *The Contribution of the International Law Commission*, 59 AM. SOC'Y. INT'L. L. PROC. 8 (1965).

[72] *Id.*

[73] J. Singh, *Codification and Progressive Development of International Law: The Role of the International Court of Justice*, 18 IND. J. INT'L. L. 8 (1978).

> The court's decision shows that a state which relies on an alleged international custom practised by states must, generally speaking, demonstrate to the Court's satisfaction that this custom has become so established as to be binding on the party.[74]

THE WEAKNESS OF POSITIVISM

A main weakness of positivism identified and acknowledged by legal scholars lies in its consensual approach. According to these scholars, it is false basis for reasoning in the operation of international law. In particular, Mukharjey affirms this: "this philosophy of international law glorifies the consent theory, a theory that extols the classical theory of sovereignty. This makes international law less functional and normative."[75] The process is not suitable to the universality of international lawmaking because the process of decision-making by consensus is quite difficult.[76] Furthermore, according to Starke:

> It is very difficult to reconcile the facts with a consensual theory of international law. In the case of customary rules, there are many instances where it is quite impossible to find any consent of states to the binding effects of the rule.[77]

CONCLUSION

In spite of the many weaknesses inherent in positivism, its role has been extremely influential in the systematisation of international law. It places emphasis on the actual practice of the states which has led to a more practical outlook of international law. Fenwick observes that "positivism led to more definiteness and elasticity in international law and brought about a clear cut separation between what was the law and what it might or should be."[78]

There are many theories and doctrines in relation to international law which have tried to leave a lasting impression on it. The naturalists recognised

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[74] *See supra* note 4, at 41.

[75] S. MOOKERJEA, INTERNATIONAL LAW 17 (2nd ed. 1968).

[76] Ian Brownlie, *Comparative Approaches to the Theory of International Law*, 80 AM. SOC'Y. INT'L. L. PROC. 156 (1986).

[77] *See supra* note 4, at 25.

[78] C. FENWICK, INTERNATIONAL LAW 59 (1924).

the law of nature as being the only source of international law. The positivists, in contrast, argued that treaties and customs were the main source and influence on international law. According to positivism, there are no ethical norms, only treaties and customs. The positivist theory gained precedence over the naturalists, gaining wide support from the international community as it expressed the views of the world community.

Sir Humphrey Waldoc, a well-known British international lawyer and former president of the ICJ exemplified that "positivism given full faith and credit, is an inclusive and tolerant approach to the sources of international law and the views of world community."[79]

Modern international law mainly consists of conventions and customary rules which can trace their origins back to positivism. At present, these are the soul of international law. The international community enjoys the benefits of trade, commerce, and other interactions due to the influence of positivism. Whilst international law may still be evolving under the influence of positivism, it shall undoubtedly become more dynamic, being of greater benefit to international relations in general in the future.

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[79] *See supra* note 75, at 156.

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