> we now know as international law is modern, dating only from the 16th and 17th centuries, for its special character has been determined by that of the modern European state system, which was itself shaped in the ferment of the Renaissance and the Reformation.[4]
>
> The origin of the international community in its present structure and configuration is usually traced back to the Peace of Westphalia (1648), which concluded the ferocious and sanguinary Thirty Years War. However, it was not then that international intercourse between groups and nations started. From time immemorial there had been consular and diplomatic relations between different communities, as well as treaties of war and peace and treaties of alliance; reprisals had been regulated for many years, and during the Middle Ages a body of law on the conduct of belligerent hostilities had gradually evolved. A peace treaty going back to approximately 3100 BC has come to light – concluded in the Sumerian language between Eannatum, the victorious ruler of the Mesopotamian city state of Lagash, and the representatives of Umma, another Mesopotamian city state, which had been defeated. And yet all these relations were radically different from current international dealings, for the body politic itself was different.[5]

It can be seen that there is widespread agreement that the modern system of international law developed from Western European origins. With the gradual break up of the Holy Roman Empire after 1648, states such as England, the Netherlands, France and Spain became strong and independent from any superior authority. Without the influence of Papal or Imperial laws, new rules were developed to govern inter-state relations. These rules owed much to doctrines of canon law and of Roman law. The basis of the system was the consensus of equal, independent sovereign states and the rules could therefore be created by express agreement or develop out of a continued common practice. Holding such a view of the development of international law has important consequences both for the nature and definition of international law[6] and for the sources of international law.[7] However, while the perception of modern international law as a phenomenon of medieval Western European origins tends to be the prevailing one there are those who take a different view:

> As all the introductory historical sections of the leading textbooks agree, it was not until this time[8] that there appeared, in the shape of nation states possessing unlimited sovereignty, those subjects of international law which, together with the simultaneously and universally blossoming theoretical study of constitutional and international law, provided the doctrinal bases for a legally ordered system of states. At this time the only open question was the date when the international law of the modern era was supposed to have begun. After some hesitation, a willingness was expressed to go back a good century before Grotius, to Charles VII's Italian Campaign of 1649, to Machiavelli and Bodin, to the

4 JL Brierly, *The Law of Nations, An Introduction to the International Law of Peace*, 6th edn, 1963, Oxford: Oxford University Press at p 1.

5 Antonio Cassese, *International Law in a Divided World*, 1986, Oxford: Oxford University Press at p 34.

6 See, for example, the views expressed by Hall, Westlake and Oppenheim at p 9.

7 Discussed in Chapter 3.

8 ie the modern era – post 1648.

overseas expansion of the European maritime powers and to the theories of the Spanish late scholastics. Everything lying further back, even in the cases where important development factors were recognised, was consciously left out of consideration … It was evident from a comparatively early point that the basic requirements for an international legal order were fully present in the European society of states not just at the beginning of the modern era, but, at the latest, by the end of the 13th century. It was recognised that the concepts of law and legal validity underlying European international law, the justifications which were always necessary when an action entailed intervention in a foreign area, the duty to participate in common sanctions against disturbers of the peace, and other basic ideas all went back to the early era of the ancient Greek *polis*, ie to the sixth century before Christ. It was further recognised that, not merely in the modern eras but at all times, international legal practice was accompanied by the theoretical ideas and claims of theologians, philosophers, historians and, later, lawyers. What this means is that, although the theory of the modern era became vastly more detailed over what had hitherto been customary, it hardly contained anything in principle that was new. Since the beginning of the 1930s, following in the footsteps of historical and archaeological research, the history of international law finally began to explore the wider world beyond Europe. First of all the history of international law turned to the ancient Near East – which also includes Egypt – and to later international legal developments in the region, in particular, those brought into being from the sixth decade of the seventh century onwards by the formation and spread of Islam. The most incisive changes to the picture handed down by the 19th century may, however, be expected from the efforts which only began in recent decades to uncover international legal developments which, of their own volition, appeared in the world outside Europe and away from the Mediterranean. As yet, no more than a start has been made. It is nevertheless possible, even given the gaps in our knowledge, to accept that there is, beyond the world of the Near East and Europe (which understandably claimed the attention of early researchers), evidence of international law scattered over the earth in abundance.[9]

The end of World War I is almost unanimously considered as the end of an epoch in the history of the law of nations. It is also generally accepted that this caesura was more profound than those of 1648 or 1815, which marked previous transformations of international law, adopted it to the changing character of the state system which was fashioned and conditioned by the sequence of Spanish, French and British supremacy. It is generally accepted that by 1919 the classical system of international law had given way to a different system, often called 'new' or 'modern' international law. However, terminological confusion may result from the ambiguity inherent in the words 'new' and 'modern'. Historians customarily see 'modern times' as beginning at the end of the 15th century, and the new type of international law which developed from this juncture, the 'classical' system, is often called 'modern international law'. In the interest of avoiding confusion the author prefers to use the term 'post-classical' to denote the type of international law which began to evolve in 1919. Together with the classical system, it forms part of modern – in contrast to medieval – international law.

9 Wolfgang Prieser, 'History of the Law of Nations' in R Bernhardt (ed), *Encyclopedia of Public International Law*, Vol II, 1995, pp 717–18.

In the wake of World War II and as a consequence of a new balance of forces and deep structural changes in the state system, post-classical international law was again significantly modified. What began in 1919 entered into a second stage in 1945 – a stage, however, which both continued and developed the traits of the first post-classical period. In comparison with the law of preceding centuries, the two latest stages belong together and justify their classification within a coherent post-classical system.

The basic and characteristic feature of the classical system was its close commitment to the modern sovereign state as the sole subject of international law. Deriving from this basic structure, two other elements helped to form the shape of the classical system: the unorganised character of the international community, composed of a multitude of sovereign states as legally equal, if *de facto* unequal members; and the acceptance of war as the ultimate instrument of enforcing law and safeguarding national honour and interest.

Starting in 1919, a different system of international law developed, based on a new concept of the nation state which, by force of circumstances, was more receptive to the idea of some restrictions of its sovereign rights (eg in the field of minority protection) and more sensitive to the rights of the human individual and his legal protection. For the first time in history, an attempt was made to organise the international community within a League of Nations, which was intended to become a universal framework for regulating the peaceful intercourse of nations and for preventing armed conflict. War as an instrument of national policy was intended to be restricted by the League Covenant, and subsequently outlawed by the Kellogg-Briand Pact (1928).[10]

1.2 Definitions and the nature of public international law

International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law. International law in the meaning of the term as used in modern times began gradually to grow from the second half of the Middle Ages. As a systematised body of rules, it owes much to the Dutch jurist Hugo Grotius, whose work, *De Jure Belli ac Pacis, Libri iii*, appeared in 1625, and became a foundation of later development.

That part of international law that is binding on all states, as is far the greater part of customary law, may be called *universal* international law, in contrast to particular international law which is binding on two or a few states only. General international law is that which is binding upon a great many states. *General* international law, such as provision of certain treaties which are widely, but not universally, binding and which establish rules appropriate for universal application, has a tendency to become universal international law.

One can also distinguish between those rules of international law which, even though they may be of universal application, do not in any particular situation give rise to rights and obligations *erga omnes*, and those which do. Thus, although all states are under certain obligations as regards the treatment of aliens, those

10 William G Grewe, in R Bernhardt (ed), *Encyclopaedia of Public International Law*, Vol II, 1995 pp 839–40.

obligations (generally speaking) can only be invoked by the state whose nationality the alien possesses: on the other hand, obligations deriving from the outlawing of acts of aggression, and of genocide, and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are such that all states have an interest in the protection of the rights involved.[11] Rights and obligations *erga omnes* may even be created by the actions of a limited number of states. There is, however, no agreed enumeration of rights and obligations *erga omnes* and the law in this area is still developing, as it is in the connected matter of a state's ability, by analogy with the *actio popularis* (or *actio communis*) known to some national legal systems, to institute proceedings to vindicate an interest as a member of the international community as distinct from an interest vested more particularly in itself. The International Court of Justice has held that proceedings in defence of legal rights or interests require those rights or interests to be clearly vested in those who claim them (even though they need not necessarily have a material or tangible object damage to which would directly harm the claimant state), and that the *actio popularis* 'is not known to international law as it stands at present'.[12] Although the notion of *actio popularis* is in some respects associated with that of rights and obligations *erga omnes*, the two are distinct and, to the extent that they are accepted, each may exist independently of the other.

International law is sometimes referred to as 'public international law' to distinguish it from private international law. Whereas the former governs the relations of states and other subjects of international law amongst themselves, the latter consists of the rules developed by states as part of their domestic law to resolve the problems which, in cases between private persons which involve a foreign element, arise over whether the court has jurisdiction and over the choice of the applicable law: in other terms, public international law arises from the juxtaposition of states, private international law from the juxtaposition of legal systems. Although the rules of private international law are part of the internal law of the state concerned, they may also have the character of public international law where they are embodied in treaties. Where this happens the failure of a state party to the treaty to observe the rule of private international law prescribed in it will lay it open to proceedings for breach of an international obligation owed to another party. Even where the rules of private international law cannot themselves be considered as rules of public international law, their application by a state as part of its internal law may directly involve the rights and obligations of the state as a matter of public international law, for example where the matter concerns the property of aliens, or the extent of the state's jurisdiction.[13]

The title and subject matter of this book is *Public International Law*. For convenience we shall use the terms public international law and international law interchangeably. The subject has also been known as the Law of Nations and the Law of War and Peace. International law must be distinguished from municipal, internal or domestic law. As a starting point, international law can be said to apply only between those entities that can claim international

11 *Barcelona Traction* case (Second Phase) [1970] *ICJ Rep* at p 32.

12 *South West Africa* cases (*Ethiopia and Liberia v South Africa*) (Second Phase) [1966] *ICJ Rep* at p 47.

13 *Oppenheim's International Law*, edited by Jennings and Watts, 9th edn, 1992, Longman at pp 4–7 (footnotes omitted).

personality, whilst municipal law is the internal law of states and regulates the conduct of individuals and other legal persons within the jurisdiction. Public international law should also be distinguished from private international law. Private international law, or the conflict of laws, is the term used to describe the body of rules of municipal law that regulates legal relations with a foreign element such as, for example, contracts of sale between persons in different countries or marriages between persons from different legal systems.

It can be argued that the functions of international law are different from the functions of municipal law. In the main, international law is not concerned with the rights and duties of individuals, except where states have agreed that this should be so. International law plays a major role in facilitating international relations. It is clearly of considerable importance in the drafting of diplomatic documents and treaties, as well as, in appropriate instances, in the drafting and application of internal legislation. It should also be remembered that law can never be totally separated from questions of political reality. In international law, the political and the legal are extremely closely intertwined. International law cannot exist in isolation from the political factors operating in the sphere of international relations.

On another level, international 'law' needs to be distinguished from international 'non-law'. Reference is sometimes made to international comity or international usage to indicate those norms of behaviour that are outside the rules of law, properly called. Some writers argue that the problem is resolved with the adoption of a comprehensive definition of law, while others deny that a definition is either possible or desirable. To some extent the problem of identifying the rules of international law is dealt with in Chapter 3, but at this early stage it may be useful to refer to some of the various concepts and definitions of the subject that have been offered.

> International law, as its name implies, is a form of law. In your law studies, you have come across various other forms of law – contract law, land law, LA Law. Well, international law is no different in principle from any other form of law. However, since none of you will have anything but the most infantile ideas about the theoretical nature of law in general, it's not really very exciting of me to say that international law is law like any other law.
>
> It'll probably never have occurred to you, and maybe no one has ever told you, that law is an aspect of the systematic structure of a society. There's been a great deal of discussion down the centuries about just how law fits into the general structural system of society. Some really heavy names have had all sorts of seriously weird ideas about that – Plato and Confucius and Moses and Nietzsche and Hitler – people like that. But the long and the short of it all is that society is not quite like a poem, and society is not quite like a motor-car, but society is a bit like both of them.
>
> Society is like a poem because it's a creation *of* human consciousness, *for* human consciousness. Society is a work of the imagination, like literature. But society is also a bit like a machine, such as a car, because it's designed to process specific inputs into specific outputs, following a structured system. And the structured system determines the relationship of the output to the input. And the result of it all is that society, like a motor-car, is designed to travel from A to B, namely, from the past to the future.

Well, one input into society is the activity of individual human consciousness, imagination and reason. And the output is social consciousness which then re-enters individual consciousness and pre-existing social consciousness. So there's a systematic loop – with the individual human being making society, as society makes society and the individual. *Society and the individual make society and the individual*. Our first slogan.

A poem works because there are conventions of vocabulary and grammar and syntax, and there are great semantic force-fields in which the poem is placed, force-fields of associative meaning and shared meaning. So the poem is an output from the poet and an input into the reader into which the reader also puts an input. A poem does not exist in quite the same way that a particular table exists: it is any number of resultants formed from all the interacting inputs and outputs.

In the case of a particular society, the society creates great semantic force-fields for itself, as an integral part of its self-creating as a society – religion, mythology, morality, philosophy, art and so on. And then systematic principles of society's functioning – social vocabulary and grammar and syntax, as it were – determine the specific outputs of the given society, determine the interactive effect between society and its members, and between the society and other societies.

The totality of the systematic processes of society is presented to society in what we call a constitution. The constitution of a society is a bit like the personality of a human person: it's a structured summation of a particular functioning identity, evolving over time, forming itself over time. The constitution forms the society as the society forms its constitution. *Society is a system constituting itself as a system*. Another slogan.

One aspect of the constitution of a society is its legal constitution. This is a specifically organised set of social sub-systems which process social material in a particular way. The constitution of a society carries the society from its past to its future. The society continues over time and space because it continues in the consciousness of its members and of those who observe it. And the continuation over time and space of a society is achieved by ordering the willing and acting of the members of society in accordance with the constitution of the society.

The law, made under the legal constitution, organises legal relations – that's to say, it organises the interactive willing and acting of two or more members of society. If you and I are bound by a legal relation – say, a right or a duty – then, if we will and act in conformity with the legal relation, we act in the way society wanted us to act. The legal relation socialises our behaviour, or, to put it another way, the legal relation universalises the particularity of our behaviour in the social interest.

But, of course, there are not only two people involved in a legal relation. A legal relation involves many other people in its implementation. A legal relation is really the focus of a network of legal relations. And legal relations necessarily involve what is called *accountability*.

Accountability means that society watches the way in which its legal relations take effect. It monitors them socially – social accountability; and it monitors them legally – legal accountability, including the monitoring through legal proceedings. Accountability means that the implementation of legal relations feeds back into the total social process, being judged in terms of society's values, leading perhaps to protest or dissent, leading perhaps to a change in the law.

So law is an intensely dynamic thing, flowing from the past of society into its future, tending to make the future of society into what society has willed in the

> past that its future should be. That's why some of us define the law as specifically retained acts of social willing. *The law is an ever-changing set of retained acts of social willing*. Our third slogan.
>
> So society is a purposive enterprise, inventing purposes for itself in the form of values, organising itself to achieve its purposes.
>
> One way in which society acts is through economic action, that's to say, through transforming material reality and ideal reality in ways which society values as conducive to its survival and prospering. And that's an important social function of law. The law is used to make economic transformation possible. The law of property, contract, money, corporate law – and so on – are sets of legal relations which are designed to organise particular forms of social transformation, especially economic transformations.
>
> So that's what all society is and what all law is. And that means that we now already know what international society is and what international law is.
>
> International law is, simply, the law of international society. The whole human race seeks its survival and prosperity through transforming the world in accordance with its values. The whole human race uses social processes to cause its future to be in accordance with what it wills that its future should be.[14]

1.2.1 The traditional view

The view expressed in the most recent edition of Oppenheim represents a retreat from the traditional conception of international law as the law of nations, exclusively the province of nation states. For example, Hall in 1890 wrote:

> International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of the country, and which they also regard as being enforceable by appropriate means in case of infringement.[15]

Four years later Westlake stated, 'international law is the body of rules prevailing between states'.[16]

Oppenheim was even more explicit when he wrote, 'states solely and exclusively are the subjects of international law'.[17]

In 1927, the Permanent Court of International Justice was called upon to decide a dispute between France and Turkey. In the course of the judgment the court found it necessary to set down the parameters of international law:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[18]

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14 Philip Allott, 'New International Law – The First Lecture of the Academic Year 20—' in *Theory and International Law: An Introduction*, 1991, London: BIICL at pp 108–10.

15 WE Hall, *A Treatise on International Law*, 3rd edn, 1890, Oxford: Clarendon Press.

16 Westlake, *International Law*, 1894, Cambridge: Cambridge University Press.

17 Oppenheim, *International Law*, 1st edn, 1905, London: Longmans.

18 The *Lotus* case PCLJ Ser A, No 10 (1927).

1.2.2 The modern view

Although international law may have developed as a system of rules governing the relations between sovereign states, it has developed beyond that. The establishment of the League of Nations after the First World War marked a shift in approach to international relations which received further impetus with the setting up of the United Nations Organisation in 1945. The Nuremberg War Crimes Tribunal in 1946 raised questions of the international obligations of individuals and the *Universal Declaration of Human Rights* 1948 suggested the possibility of individual international rights. In the wake of the United Nations, a number of other super-national organisations were established, all raising questions of their status within the community of nation states. In 1949 the International Court of Justice was asked by the General Assembly of the United Nations for its opinion on matters arising out of the assassination of a UN representative in Jerusalem. In the course of its judgment the court stated:

> … [the United Nations Organisation] is a subject of international law and capable of possessing international rights and duties, and … has capacity to maintain its rights by bringing international claims.[19]

It was becoming clear that it was no longer adequate to discuss international law in terms of a system of rules governing exclusively the relations between states.[20] Later definitions reflected this fact:

> International law can no longer be adequately or reasonably defined or described as the law governing the mutual relations of states, even if such a basic definition is accompanied by qualifications or exceptions designed to allow for modern developments; it represents the common law of mankind in an early stage of development, of which the law governing the relations between states is one, but only one, major division.[21]

Some definitions continued to stress the primacy of states, for example:

> 'International law' is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another. As states have formed organisations of themselves, it has come also to be concerned with international organisations and an increasing concern with them must follow from the trend which we are now witnessing towards the integration of the community of states. And because states are composed of individuals and exist primarily to serve the needs of individuals, international law has always had a certain concern with the relations of the individual, if not to his own state, at least to other states ... even the relations between the individual and his own state have come to involve questions of international law ... *Nevertheless, international law is and remains essentially a law for states* and thus stands in contrast to what international lawyers are accustomed to call municipal law … [22]

Other definitions give greater acknowledgment to non-state entities:

> International law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not

19 *Reparation for Injuries Suffered in the Service of the United Nations* case [1949] *ICJ Rep* at p 174.

20 See also Chapter 5.

21 C Jenks, *The Common Law of Mankind*, 1958, London: Stevens.

22 C Parry in M Sorensen (ed), *Manual of Public International Law*, 1968, London: Macmillan (emphasis added)

> exclusively, upon sovereign states and which owe their validity both to the consent of states as expressed in custom and treaties and to the fact of the existence of an international community of states and individuals. In that sense international law may be defined more briefly (though perhaps less usefully), as the law of the international community.[23]

1.2.3 Contemporary theories

Although the early development of international law owes considerable debt to natural law concepts, much of the discussion about its nature over the last 100 years has been held within the broad church of legal positivism. Analysis of international law tended to concentrate on the activities of states and the identification of positive legal rules. Underlying the theories was a firm view that international law was based on the consensus of states to be bound. After the Second World War, world events increasingly undermined this view of law. The independence of former colonies raised the issue of the extent to which new states could be truly taken to consent to existing rules of international law.

> International law (or more precisely public international law) is an autonomous system of law that is distinct from the national legal systems of specific states. International law operates in the international system and represents its normative subsystem.
>
> In literature one may find different definitions of the international system. Some of them are so wide that they encompass, in effect, all of human society. In the present context there is no need to analyse these definitions.
>
> What is then the international system in which international law is a component part?
>
> That system encompasses states, international (inter-state) organisations, various associations of states (eg the non-aligned movement and the Group of 77), nations and peoples struggling for their independence, and also certain state-like formations (eg free cities and the Vatican). That, then, is the inter-state system. It includes not only the subjects that have been listed but also relations among them (international relations in the narrow sense of the word), international legal and other social norms (norms of international morality, international comity, international customs) and also mutual interactions among all the components of the international system and between that system itself and its components. Such a system does indeed exist. Lenin noted that 'we are living not merely in a state but in a system of states'.
>
> What is important for international legal science is that aside from other components the concept of 'international system' also includes international law. It follows that international law must be viewed in its mutual interaction with them, while international relations must be studied in their interaction with international law and not independently of it ...
>
> The basic task of international law is to contribute to a normal functioning of the international system and to ensure peace and a resolution of international problems through legal means, on the basis of agreements among sovereign and equal states.[24]

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23 Hersch Lauterpacht, *Collected Papers*, Vol 1, 1970, Cambridge: Cambridge University Press.

24 G Tunkin (ed), *International Law: a textbook*, 1982, Moscow: Progress Publishers.

The onset of the Cold War and the dominance of the two super-powers brought into question the extent to which the behaviour of the United States and the Soviet Union was guided by positive legal rules. In the 1950s the American Realists turned their attention from analysing municipal legal systems to international law. They found that law was not determined by legal rules nor by precedents but that judicial decision making was an intuitive act motivated by a desire to do justice in a particular context. International law needs to be studied in the context of international society and not merely as a collection of legal rules capable of being understood on their own.

Another approach, often referred to as 'sociological jurisprudence', involved an attempt to move away from simple analysis of rules to consider international law as an integral part of the diplomatic and political process. Notable here is the work of Myres McDougal whose policy-oriented approach sees law as a process of decision-making rather than a system of rules and obligations. McDougal has been criticised for minimising the legal content of the study of international law, and later writers, such as Richard Falk, while adopting the general approach of McDougal, have sought to place greater emphasis on the importance of legal rules and structures.

> Two criticisms are often advanced against international law. One group of critics has accused international law of being too political in the sense of being too dependent on states' political power. Another group has argued that the law is too political because founded on speculative utopias. The standard point about the non-existence of legislative machineries, compulsory adjudication and enforcement procedures captures both criticisms. From one perspective, this criticism highlights the infinite flexibility of international law, its character as a manipulable facade for power politics. From another perspective, the criticism stresses the moralistic character of international law, its distance from the realities of power politics. According to the former criticism, international law is too apologetic to be taken seriously in the construction of international order. According to the latter, it is too utopian, to identical effect.
>
> International lawyers have had difficulty answering these criticisms. the more reconstructive doctrines have attempted to prove the normativity of the law, its autonomy from politics, the more they have become vulnerable to the charge of utopianism. The more they have insisted on the close connection between international law and state behaviour, the less normative their doctrines have appeared ...
>
> Many of the doctrines which emerged from the ashes of legal scholarship at the close of the First World War explained the failure of pre-war international doctrines by reference to their apologist character ... Writings by Hersch Lauterpacht, Alfred Verdross and Hans Kelsen among others, created an extremely influential interpretation of the mistakes of pre-war doctrines. By associating the failure of those doctrines with their excessive closeness to state policy and national interest and by advocating the autonomy of international legal rules, these jurists led the way to the establishment of what could be called a *rule approach* to international law, stressing the law's normativity, its capacity to oppose state policy as the key to its constraining relevance.
>
> The approach insists on an objective, formal test of pedigree (sources) which will tell which standards qualify as legal rules and which do not. If a rule meets this test, then it is binding. Though there is disagreement between rule approach lawyers over what constitutes the proper test, there is no dispute about its

importance. The distinctions between hard and soft law, rules and principles, regular norms and *jus cogens*, for instance, are suspect: these only betray political distinctions with which the lawyer should not be too concerned. Two well-known criticisms have been directed against this approach. First, it has remained unable to exclude the influence of political considerations from its assumed tests of pedigree. To concede that rules are sometimes hard to find while their content remains, to adopt HLA Hart's expression 'relatively indeterminate' is to undermine the autonomy which the rule approach stressed. Second, the very desire for autonomy seems suspect. A pure theory of law, the assumption of a *Volkerrechtsgemeinschaft* or the ideal of the wholeness of law – a central assumption in most rule approach writing – may only betray forms of irrelevant doctrinal utopianism. They achieve logical consistency at the cost of applicability in the real world of state practice.

The second major position in contemporary scholarship uses these criticisms to establish itself ... Roscoe Pound's programmatic writings laid the basis for the contemporary formulation of this approach by criticising the attempt to think of international law in terms of abstract rules. It was, rather, to be thought of 'in terms of social ends'.

According to this approach – the *policy approach* – international law can only be relevant if it is firmly based in the social context of international policy. Rules are only trends of past decision which may or may not correspond to social necessities. 'Binding force' is a juristic illusion. Standards are, in fact, more or less effective and it is their effectiveness – their capacity to further social goals – which is the relevant question, not their formal 'validity'.

But this approach is just as vulnerable to well-founded criticisms as the rule approach. By emphasising the law's concreteness, it will ultimately do away with its constraining force altogether. If law is only what is effective, then by definition, it becomes an apology for the interests of the powerful. If, as Myres McDougal does, this consequence is avoided by postulating some 'goal values' whose legal importance is independent of considerations of effectiveness, then the (reformed) policy approach becomes vulnerable to criticisms which it originally voiced against the rule approach. In particular, it appears to assume an illegitimate naturalism which – as critics stressing the liberal principle of the subjectivity of value have noted – is in constant danger of becoming just an apology of some states' policies.

The rule and the policy approaches are two contrasting ways of trying to establish the relevance of international law in the face of what appear as well-founded criticisms. The former does this by stressing the law's normativity, but fails to be convincing because it lacks concreteness. The latter builds upon the concreteness of international law, but loses the normativity, the binding force of its law. It is hardly surprising, then, that some lawyers have occupied the two remaining positions: they have either assumed that international law can neither be seen as normatively controlling nor widely applied in practice (the sceptical position), or have continued writing as if both the law's binding force as well as its correspondence with developments in international practice were a matter of course (idealist position). The former ends in cynicism, the latter in contradiction ...

The difficulty in choosing between a rule and a policy approach is the difficulty of defending the set of criteria which these put forward to disentangle 'law' from other aspects of state behaviour. For the rule approach lawyer, the relevant criteria are provided by his theory of sources. For the policy approach, the corresponding criteria are provided by his theory of 'base-values', authority or some constellation of national or global interest and need, because it is these