CHAPTER 1
NATURE, SOURCES AND EVIDENCE OF INTERNATIONAL LAW: THE TRADITIONAL AND CONTEMPORARY VIEWS

Section I. THE TRADITIONAL VIEW OF THE NATURE OF INTERNATIONAL LAW

1-1. A Multifaceted Jurisprudence. *a.* If asked to "define" international law, a law professor would most probably articulate this classic definition: "International law consists of those rules and regulations which bind nation states in their relations with each other." [1] Although academically and theoretically correct, this definition nevertheless fails to provide the military attorney with any practical insight into the distinctive areas of international jurisprudence, the interrelationship of these areas, and the sources and evidences of these rules and regulations. The purpose of this chapter will be to provide this insight. Additionally, the views of evolving and socialist states on international law will be examined in some detail.

b. Far from being simply an amorphous collection of vague concepts and principles, international law is comprised of distinct component parts. As such, it is a body of law which has evolved out of the experiences and the necessities of situations that have involved members of the world community over the years. International law exists because it is to the benefit of all states that some sort of order govern their international dealings. There may be disagreement among them as to what law applies to a given situation, but there is no disagreement as to the fact that some set of rules is necessary. In the absence of a world government, these rules are made by the states themselves. States are, therefore, the ultimate drafters of international law. The composition of this law can best be explained by a careful analysis of the following chart.

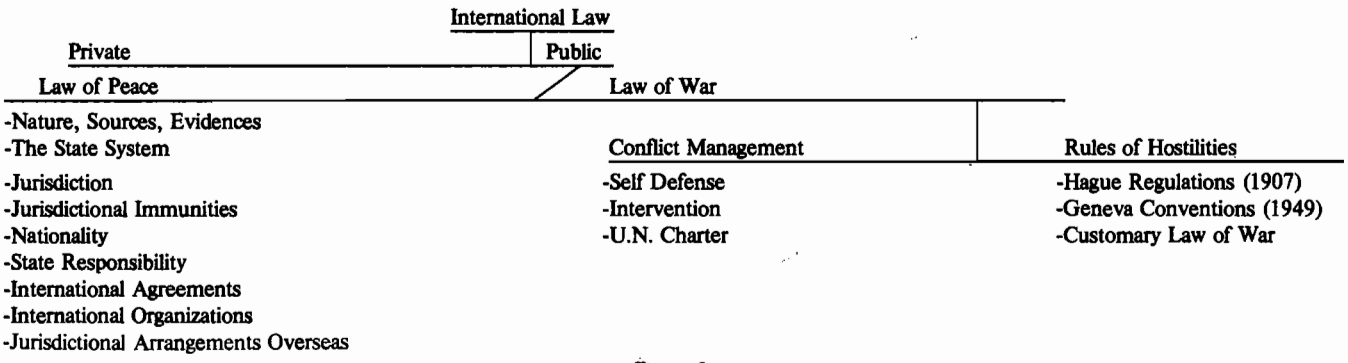

Figure 1.

c. Initially, it is important to distinguish between the private and public sectors of international law. In the former, private practitioners will be direct participants in legal matters of a primarily commercial nature. Private international law thus consists of subject matter generally found in law school courses dealing with Conflict of Laws, International Business Transactions, and other related areas. Typical items of private international law concern would be questions of international tax, franchising, patents, and incorporation. Interesting in nature, this is not, however, the area of international law of principal concern to the military attorney. [2] It is the public sector of international law in which the military lawyer may often find himself an active participant. Accordingly, it is essential that the various elements of this aspect of international jurisprudence be fully understood. Traditionally, public international law has been viewed as operative *only* among nation states. That is, only states are to be considered true subjects of the law. Private citizens and corporate personalities are simply objects of international norms, with the former generally becoming involved in international legal matters only by serving as representatives of nation states. [3]

d. For purposes of study and analysis, public international law has generally been divided into two distinct areas—The Law of Peace and The Law of War (Use of Force).

(1) *The Law of War.* It is helpful to divide this latter area of jurisprudence into distinct portions: Conflict Man-

1. *G. Hackworth, Digest of International Law* 1 (1940). *See also W. Bishop, International Law* 3 (3d ed. 1971); *H. Kelsen, Principles of International Law* 201 (1952).

2. As a legal adviser to one of the armed services, the military attorney will be primarily concerned with providing legal advice to an integral element of the United States Government. Accordingly, international legal problems which arise will seldom be matters of a purely private nature. There does exist, however, a growing feeling that the traditional distinction between private and public international law must be eliminated, due to the ever increasing interrelationship between these two areas of jurisprudence. *See W. Friedmann, The Changing Structure of International Law* 70 (1964).

3. *C. Fenwick, International Law* 32-33 (4th ed. 1965). The reader should be aware, however, that many jurists now question the applicability of this traditional view of international law to the legal realities of the latter twentieth century. These individuals argue that private citizens, some international organizations, and even various corporate entities should be considered subjects of public international law. This contention has gathered strong support, especially in the rapidly developing area of human rights.

agement and the Rules of Hostilities. The Conflict Management aspects of the Law of War consist of those legal concepts and principles developed for the purpose of eliminating or substantially reducing conflict within the international community. Of primary concern here are specific provisions of the U.N. Charter and the concepts of self-defense and intervention. [4] If these norms, for one reason or another, fail to prevent the occurrence of conflict, the other aspect of the Law of War then comes into play—the Rules of Hostilities. Of major importance here are the 1907 Hague Regulations and the 1949 Geneva Conventions, those treaty rules and regulations applicable to the actual conduct of combat and the concurrent humanitarian safeguards. [5] The customary Law of War may sometimes be looked to in areas where no codified concepts have been formulated. Publications dealing with the Law of War available to the military attorney include DA Pam 27-161-2, *International Law, Volume II* (1962); DA Pam 27-1, *Treaties Governing Land Warfare* (1956); and FM 27-10, *The Law of Land Warfare* (1956). [6]

(2) *The Law of Peace.* As the second major area of public international law, this generally comprises 75 to 90 percent of the content of most international law courses taught in law and graduate schools. Often viewed by many military attorneys as a "nice to know—but hardly relevant" aspect of their professional responsibilities, the various elements of this area of international jurisprudence provide the basic framework upon which both the Law of War and international jurisdictional arrangements are based. [7] It is this framework of the law with which this publication deals. Each of the chapters contained herein will focus on one of the elements of the Law of Peace shown in figure 1 above. [8]

e. The purpose of this brief analysis of the interrelationship of the various aspects of international law has been to alert the reader to the fact that sound legal advice on international legal matters is dependent on the attorney's appreciation of the broad range of international legal norms. A working knowledge of the Law of Peace is the first step in this learning process.

1-2. The Original Development of International Law. *a. The Peace of Westphalia.* International law is basically a product of Western European civilization. [9] Being a law between sovereign states, international jurisprudence did not, indeed could not, arise until the modern nation-state system came into existence. The birth of this system is conveniently ascribed to the Peace of Westphalia of 1648, by which the Thirty Years' War was concluded. [10] It was, in a sense, the constitution for the states that, almost to this day, comprise the map of Europe. [11]

b. International law did not develop gradually. It arose rather suddenly to fill a definite need created by the fairly abrupt change in the composition of European political society which resulted from the Thirty Years' War. This is not to say, however, that earlier ages did not contribute significantly to the formulation of international law. Early jurists in the field drew heavily on the practice of prior civilizations where rules regulated the existing intercommunity relations. [12] Major contributions toward establishing a viable system of international norms were made by the Hebrews, Greeks, Romans, and several individuals in the Middle Ages. [13]

1-3. The Theories and Schools of International Law in the State System. *a.* Theories. Following the disintegration of the Holy Roman Empire, but prior to the Peace of Westphalia, the Renaissance widened man's intellectual horizon and the discovery of the New World stimulated the imagination of philosophers as well as of explorers. Vitoria, a Spanish theologian whose lectures were published in 1557 after his death, sought to apply the principles of international morality to the problems of the native races of the Western Hemisphere. In another and earlier treatise he formulated, in clearer terms than had

4. For a brief but well reasoned discussion of these basic Conflict management concepts, *see* J. McHugh, *Forcible Self-Help in International Law, Naval War College Review*, Nov-Dec, 1972, at 61.

5. Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat, 2277, T.S. No. 539, 2 *Malloy, Treaties* 2269; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

6. These are only a few of the publications dealing with the Law of War available to the military attorney. Materials specifically designed to assist in the teaching of the Hague and Geneva Conventions are also available.

7. International jurisdictional arrangements are an aspect of public international law of particular importance to the military attorney. These arrangements speak to the jurisdiction to be exercised over military forces stationed overseas and generally occur in the form of Status of Forces Agreements, Military Assistance Advisory Group (MAAG) Agreements, and Military Mission Agreements. This subject will be dealt with in detail in chapters 4 and 5, *infra.*

8. *See* page 1-1, *supra.*

9. This fact has had a great impact on the contemporary view of the socialist and evolving states toward international law. *See* section III, p. 1-13, *infra.*

10. The Thirty Years' War, beginning in 1618, was a confused struggle of religious and political objectives. Beginning as a domestic struggle between over 350 individual German states, the war rapidly engulfed, for a variety of reasons, the major states of Europe. Finally, when the participants had exhausted their resources, the war was terminated by the Peace of Westphalia of 1648. This agreement consisted of the two treaties of Osnabruck and Munster, to which all of the leading Christian states of Europe were parties.

11. *C. Eagleton, International Government* 5 (3d ed. 1957); *C. Fenwick, International Law* 14-15 (4th ed. 1965).

12. *J. Brierly, The Law of Nations* 1-2 (6th ed. 1963).

13. For an excellent analysis of the influence of earlier civilizations on the development of international law, *see A. Nussbaum, A Concise History of The Law of Nations* (2d ed. 1954).