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Max Huber's Sociological Approach to International Law Revisited

Jost Delbrück*

Abstract

Almost a century ago Max Huber published his basic text on a sociology of international law. In a time like ours in which serious challenges to the notion of an international law binding upon all states are not uncommon, it appears to be appropriate to recall Huber's outstanding contribution to this recurrent debate over the nature and role of international law in international relations. To understand his conception of a sociology of international law, this article traces the impact of Huber's socio-political and intellectual environment on his work. Central to Huber's conceptualization of a sociology of international law is his perception of the nature of the state and the key problem of the binding force of international law, which he ultimately found to rest on the collective interest of the states in its binding force. In his early years, Huber adhered to the notion that international law is plain 'Machtrecht', but later on he turned away from this position without retreating from his sociological approach to international law altogether.

1 Introduction

Almost a century has passed since Max Huber (1874–1960) published his first and most comprehensive work on the sociological foundations of international law: *Die soziologischen Grundlagen des Völkerrechts*.[1] This ground-breaking work was followed

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* Professor em. Dr.Dr.rer.pol.h.c., LL.D.h.c.(IN), former director of the Walther-Schücking Institute of International Law at the University of Kiel, Germany. Email: jdelbrueck@web.de.

[1] An earlier version of this work was published in *Jahrbuch des öffentlichen Rechts der Gegenwart* (1910), iv, at 56 ff., under the slightly differerent title 'Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft' ('Contributions to the Knowledge of the Sociological Foundations of International Law and the "*société des nations*"'). 'Die soziologischen Grundlagen desVölkerrechts' published as a reprint in P. Klein and H. Kraus (eds), *Internationalrechtliche Abhandlungen* (1928), and in M. Huber, *Gesellschaft und Humanität, Vermischte Schriften* (1948), iii, at 49 ff. (hereinafter cited as 'Grundlagen').

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by a number of shorter articles elaborating his sociological approach to understanding the social basis of international law, or more precisely, of the international system for which it is claimed that international law is its legal order.[2] Inspired by Bertha v. Suttner's acclaimed book *Die Waffen nieder!* ('*Weapons Down!*'), published in 1889 in reaction to the horrors of the Battle of Solferino and the US Civil War, Huber, then 15 years old, developed a keen interest in international relations and the role of international law in the maintenance of international peace. Consequently, as a law student he focused on international law and completed his studies with a dissertation on '*Staatensuccesion – Völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*' ('State Succession – International and Constitutional Law Practice in the XIXth Century', 1898). In the following years of his academic career, the fundamental questions of the nature of the international system of sovereign states, of international law as law, i.e. the basis of its binding force, and the driving forces of its development in history, became the main focus of his work – questions that Huber found to be unsatisfactorily answered by both the older natural law and by the then dominant positivist schools of thought.

These questions have recently become highly topical again in view of the intense international controversy over the scope of the prohibition of the use of force and the reach of fundamental human rights as limitations upon states' activities in the context of the so-called War against Terrorism. Thus, it appears to be timely and appropriate to return to the writings of an international legal scholar who, on the one hand, never became a pacifist, despite his sympathy for the pacifist movement, and, on the other hand, has been labelled – rightly or wrongly – as a moderate realist.[3] Huber's innovative sociological approach to international law was developed at a time when, like today, the role of international law was met with growing scepticism, to say the least. The point is to find out whether this approach may still provide relevant insights into the conduct of international relations within the framework of international law in a world once again troubled by increasing tensions and the neglect of fundamental principles of international law.

The present inquiry will proceed in three steps. The socio-political environment in which Huber developed his approach as well as the major impact of the work of contemporary scholars on Huber in the field of jurisprudence and sociology in particular will be outlined in Section 2. Next, Section 3 will attempt to lay out the main features

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[2]   See, *inter alia*, Huber, 'Gemeinschafts- und Sonderrecht unter Staaten' ('Communal Law and Particular Law Among States'), in *Festschrift für Otto von Gierke* (1911), at 817 ff; Huber, 'Der Wert des Völkerrechts' ('The Significance of International Law'), Address to the Swiss International Law Association, 1916, in: Huber, *Gesellschaft und Humanität*, *supra* note 1, at 163 ff; Huber, 'Die konstruktiven Grundlagen des Völkerbundsvertrages' ('The Constructive Foundations of the League of Nations Covenant' (hereinafter cited as 'Constructive Foundations')) (1920), in *ibid.*, at 197 ff.; Huber, 'Die geschichtlichen Grundlagen des heutigen Völkerrechts' ('The Historical Foundations of Modern International Law' (hereinafter cited as 'Geschichtliche Grundlagen')) (1923), in *ibid.*, at 177 ff; later publications by Huber shifted their focus away from his sociological approach, see *infra* note 8, with further references.

[3]   See O. Diggelmann, *Anfänge der Völkerrechtssoziologie—Die Völkerrechtskonzeptionen von Max Huber und Georges Scelle im Vergleich (Beginnings of a Sociology of International Law—The International Law Concepts of Max Huber and Georges Scelle in Comparison)* (2000), at 32.

of Huber's sociological approach to international law. Finally, Section 4 will seek to assess the extent to which Huber's core insights into the basic driving forces of international relations and their impact on international law are relevant today, despite the considerable structural changes that have occurred in the international system.

2 The Socio-political and Academic Environment at the End of the 19th and the Beginning of the 20th Centuries

A *Socio-political Factors Impacting Huber's Work*

The end of the 19th and the beginning of the 20th centuries were marked by several countervailing political forces and movements. First, there was the persisting dominance of the sovereign state, hypostasized several decades earlier as the 'objective Spirit' ('*der objektive Geist*') or as the 'realization of the moral idea' ('*die Wirklichkeit der sittlichen Idee*') by F. W. Hegel,[4] and still seen as the sole actor of the international system as established by the Vienna Congress in 1815/1818. This system to a large extent rested on the equilibrium of power among the Great Powers of the time.[5] The dominance of states, whether as the political and social organizations of distinct nations or as the core elements in the conduct of international relations, was clearly reflected in the completely state-centred perception of domestic as well as international politics that was widely shared by large segments of society, including leading academics of the time. This state-centred perspective was also reflected in and, in part reinforced by, the ever-growing nationalism. Nationalism, together with the ensuing politics of national aggrandizement, particularly by the powerful states, on the one hand, and the formation of new nation-states under the banner of national self-determination, on the other hand, not only threatened the stability of the peace order established by the Vienna Congress but in fact led to several locally limited but intense wars.

Thus, a sense of insecurity and doubt emerged, with the growing feeling that the existing international political and legal order had come to the limits of its peace-preserving capability. This, in turn, led to the second major movement of the period under review, the European Peace Movement. Pacifism, whether in its radical version aiming at the total ban of the use of force in international relations or in its pragmatic guise propagating the use of peaceful means of conflict resolution without ruling out the use of force as *ultima ratio*, became the major opponent of the dominant nationalist power politics.[6] Pacifism envisaged an international system in which nation-states

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[4] F.W. Hegel, 'Grundlinien der Philosophie des Rechts', in H. Glockner (ed.), *Sämtliche Werke* (3rd edn., 1952), vii, paras 257 ff.

[5] On the concept of the equilibrium of power, its origins and actuality in the 19th century see H. Fenske, *Gleichgewicht/Balance,* in *Geschichtliche Grundbegriffe – Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (3rd edn. by O. Brunner, W. Conze and R. Koselleck, 1994), ii, at 959 ff.

[6] For a concise account of the different groupings and their programmes within the pacifist movement and the reactions to it on the part of the international legal community, particularly in the German speaking regions of Europe, see F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung (Walther Schückings' Conceptualization of the International Order)* (2001), at 24 ff. with further references.

would accept restraints on their sovereignty, particularly on their *jus ad bellum*, i.e. by forming international organizations as a means of institutionalized international cooperation, examples of which could already be seen in the founding of the first international administrative unions in the 1860s and 1870s. Though dealing with highly technical subjects (international postal services, telegraphy), these organizations appeared to indicate the possibility that states could indeed be prepared, in principle, to accept restraints on their sovereignty in favour of long-term reliable cooperation.[7] A further major political movement that had a strong impact on domestic societies and domestic politics, but which increasingly also became a relevant factor in international relations, was that of socialism. While not necessarily anti-state-oriented or pacifist, socialism fostered an international sense of solidarity among the working class. It thus became another countervailing force with regard to the dominant state-centred perspectives of conservative politicians and diplomats as well as of leading scholars of the time.

B *Specific Intellectual Influences Informing Huber's Sociological Approach to International Law*

It was in this socio-political environment that Huber developed his concept of and his approach to international law. But this general socio-political environment was not the only, and not even the most influential, factor shaping Huber's concept and approach to international law. For, time and again, his perception of international law and international relations was expressly informed by his firm socialization within Swiss constitutional history. The difficulties of forging a viable federation out of different, indeed, very self-confident and independently-minded regions and the ultimate success of this process became something of a guiding paradigm in Huber's conceptualization of the state as the actor in the international legal order and its organization.[8] Above all, however, ground-breaking new developments in jurisprudence and the unfolding of new academic disciplines like sociology and economics had a profound impact on Huber. Since he was by nature a very open-minded person, Huber was not only particularly susceptible to these new developments, but was also willing to integrate them to some extent into his own methodology and research. However, since these different influences came to bear on Huber's work over a time-span of about two

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[7] Since the member states of such international organizations retained their legal right to withdraw, these restraints were more of a *de facto* nature because withdrawal meant the loss of the advantages by reason which membership had been sought in the first place. Thus choosing withdrawal in practice remained more of a theoretical option: see J. Delbrück, 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization', 1: *Revue Suisse de Droit International et Droit Européen* (2001) 1, at 6 ff.

[8] See, for instance, Huber, 'Grundlagen', *supra* note 1, at 62 ff, in the context of the integration of the *Société des Nations*; also *id.*, 'Geschichtliche Grundlagen', *supra* note 2; *id.*, 'Die konstruktiven Grundlagen des Völkerbundsvertrages', *supra* note 2, at 206; *id.*, 'Der schweizerische Staatsgedanke' ('The Swiss Concept of the State'), in M. Huber, *Heimat und Tradition* (1947), at 27; similarly J. Klabbers, 'The Sociological Jurisprudence of Max Huber—An Introduction', 43: *Austrian J Public and Int'l L* (1992) 200; for a detailed analysis of Huber's perception of the state see Diggelmann, *supra* note 3, at 81 ff.

decades, they appear to some extent consecutively in his writings. However, elements of them continued to inspire Huber throughout the entire period in which he gradually developed his concept of the sociology of international law.

In his early years as a scholar, Huber was mainly influenced by Rudolf von Jhering's work. Jhering had originally been an adherent to the so-called Historical School, then turned to the Jurisprudence of Concepts School,[9] but ultimately developed a sociological approach to the law.[10] This struck a chord with Huber, particularly with regard to Jhering's theory of the origins of law that he linked to the pursuance of (mostly) conflicting interests: a perception of the formation of law that Huber found to be helpful in explaining the origins of international law, which was one of his major interests. As pointed out earlier, the role of the state and its special characteristics constituted another focus of Huber's interest in the course of his analysis of international relations. This interest was quite in line with the interests of the revitalized discipline of '*Allgemeine Staatslehre*' (General Theory of the State) in late 19th-century Germany. In view of Huber's social science leanings, it is not surprising that it was Otto von Gierke's 'organic theory of association' (*Genossenschaftstheorie*) that attracted his keen attention. Gierke's conception of the state as a living organism constituting a super-individual entity,[11] able to form a collective will and to act through its organs, influenced Huber's understanding of the nature of the state,[12] as did the sociological work of Ferdinand Tönnies, i.e. his famous '*Gemeinschaft und Gesellschaft*' (Communal Society and Associational Society).[13] Despite these and a number of other direct or indirect influences[14] that can be discerned in Huber's work (with different degrees of emphasis as his concept and methodology of international law unfolded), it certainly withstands any charge of eclecticism. As will be shown, his concept of a sociologically-based perception of international law and the international system is consistent and in many ways still relevant today. However, it must be kept in mind that, obviously deeply influenced by the horrors of World War I with its root causes in nationalist power politics as well as by his serious illness in 1922, Huber himself turned away

[9]   In German: '*Begriffsjurisprudenz*' which had become the dominant jurisprudential school in the later years of the second half of the 19th century in Germany: see F. Wieacker, *Privatrechtsgeschichte der Neuzeit (Modern History of Private Law)* (2nd edn., 1967), 433 ff; a short reference by M. Marx, 'Systeme des 19. Jahrhunderts', in A. Kaufmann and W. Hassemer, *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart* (1977), at 92.

[10]   See his 'Der Kampf ums Recht' ('The Battle for Right'); originally a lecture read to a Vienna audience in 1872, the text went into 12 editions within a couple of years and was translated into 26 languages. The English translation, 'The Battle for Right', was published in 1884; and see also Jhering's book, *Der Zweck im Recht* (1877–1883), 2 vols. (trans. I. Husik as *Law as a Means to an End* (1924)).

[11]   In German: '*höhere Lebenseinheiten, die fähig sind, einen überindividuellen Willen … zu haben*': O. Von Gierke, *Das Wesen der menschlichen Verbände* (1902, reprinted 1962), at 24 ff.

[12]   Gierke himself was influenced by the work of Herbert Spencer (1820–1903), i.e. by his *Principles of Sociology* (ed. S. Andeski, 1969), originally published as part of *A System of Synthetic Philosophy* (1862–1896), 11 vols.; see for further details Diggelmann, *supra* note 3, at 73.

[13]   F. Tönnies, *Gemeinschaft und Gesellschaft* (1887), trans. C.P. Loomis as *Fundamental Concepts of Sociology* (1940); for further references to authors who influenced Huber see Diggelmann, *supra* note 3, at 73 ff.

[14]   See *ibid.,* at 69 ff, where he lists, e.g., G. Le Bon, *Psychologie der Massen (Psychologie des Foules/The Crowd)* (1895), K. Marx and K. Jaspers, as having some impact on Huber.

from his earlier notions of international law as a '*Machtrecht*' (a power-based law) and perceived 'true law' as the law that is in accordance with the ethical standards of the Christian Religion.[15]

3 The Main Features of Huber's Sociological Approach to International Law

As a comprehensive analysis of Huber's work is clearly beyond the scope of this article, the following outline of the main features of his sociological approach to international law – and to the international system – will concentrate on two central themes that particularly characterize his approach: the nature and role of the state in international relations and the development of international law and the foundation of its binding force.

A *Huber's Conception of the State*

Quite in line with the dominant state-centred perspectives in politics, economics and, of course, in jurisprudence, Huber begins his 'Sociological Foundations' with the observation that, in the course of history, the state – all social and legal transformations notwithstanding – has been the most powerful element of all social life. Therefore, the contemporary state, with its legally bounded, but in substance unlimited, legislative power and its steadily growing material and spiritual tasks as well as with its highly developed organizational structure, deserves to be called the 'Leviathan' more than even the absolutist state of the 17th century.[16] For Huber it was thus understandable that the social sciences, i.e. jurisprudence, economics and also sociology, had focused their interests on the state and its internal legal and economic developments, but at the same time neglected what happened outside the state and between states. Huber criticizes the lack of a comprehensive study of the international realm, but recognizes that this situation is not surprising, given the fact that the different segments of the international realm themselves have not yet been treated systematically. In his view, however, international jurisprudence is an exception insofar as Grotius had presented such a systematic treatment of international law. Yet, since international jurisprudence had oscillated between Natural Law and Legal Positivism, it had little reason to concern itself with its sociological foundations. International law had been treated much too much in a legalistic fashion, although this body of law – still in an early stage of its development and highly dependent on the underlying socio-political conditions – particularly called for sociological research on these very socio-political conditions.[17]

Huber begins his analysis with the social substrate of international law, i.e. the origins and the nature of the state. Without taking sides with the various theories of

[15]   See Diggelmann, *supra* note 3, at 67 ff and 119 ff.
[16]   Huber, 'Grundlagen', *supra* note 1, at 49.
[17]   *Ibid.,* at 53.

the historical formation of the state, he accepts that in prehistoric times the peaceful coexistence of farming tribes was eventually destroyed by warring tribes who subjugated the farming tribes and then established a social organization that, according to sociological theory, ultimately resulted in the specific phenomenon called the state. The social basis of the state are the peoples or nations striving for self-organization and are defined by a naturally propagated people with a distinct common language and culture or by so-called state nations (*Staatsnationen*) that do not possess such communal traits.[18] The former, in particular, is seen as the more stable state. However, states in general are not temporary entities, but live in the space of time. They are like living organisms.[19]

As the highest level of social integration, the state is characterized by three elements that are of great importance for the further development of international relations into true interstate relations. These elements are: (1) territorial fixation and the exercise of authority over a defined territory; (2) the establishment of a permanent, exclusive rule over what Huber called '*fremdartige Elemente*' (strange elements) – in modern terms the establishment of exclusive territorial authority (*Gebietshoheit*); (3) the inherent tendency of the state to expand (*Expansionsstreben*). This expansionism led these early states to a principally hostile confrontation *vis-à-vis* the other states and to their seclusion. War was, though not continuously, the normal means of interaction between these states. Huber argues that if this urge to expand had continued to be the motivation for external political action, it would have made any community of interests and thus any international legal order impossible. However, a number of factors could result in this expansionist urge changing or even being overcome, at least for some time. For instance, one such factor could be an apparent or real equilibrium of power that could be manifested by a peace treaty, the archetype of legal interaction between states.[20] Basically, these historical characteristics of the state informed Huber's perception of the sovereign nation-state of his time.

B *The Perennial Power Struggle between States and State Egotism*

According to Huber, sovereign states are the only international actors and thus the only subjects of international law. Therefore, non-state organizations and individuals do not fall within the scope of the social substrate of international law. In this regard, Huber is an adherent of the power-politics-oriented so-called realist school.[21]

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[18]   In line with contemporary ideologies Huber's criteria determining the different types of states had distinct racial overtones that he only much later discarded as untenable: see Diggelmann, *supra* note 3, at 96 ff.

[19]   A clear reference to Gierke's biologistic conception of the state: see, for instance, Huber, *Die Staatensuccession, Völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert* (1898), at 24; and Diggelmann, *supra* note 3, at 92 ff.

[20]   Huber, 'Grundlagen', *supra* note 1, at 68.

[21]   But it is noteworthy that in his 'Grundlagen' he already recognized that, if economic development favours the further creation of cartels and trusts that are in an international and *de facto* monopolistic position, it is conceivable that states will treat these independent entities with regard to certain relationships as their equals: see *ibid.,* at 56, n. 15. Of course, this visionary assumption—much as it deviated from the then dominant realism—from the present point of view appears quite compatible with a realist perception of international relations.

Accordingly, the conduct of international relations, or in Huber's words, World Politics (*Weltpolitik*), is dominated by the antagonism between states that are pursuing their egotistic interests. He takes this perennial power struggle for survival as a natural given, which must be the starting-point for any analysis of international law.[22] A driving force behind this state egotism is the national self-consciousness of the people.[23] This national self-consciousness has given the state a spiritual, ethical foundation, thereby generating an inherent strength never reached since antiquity. State egotism, the state's urge for power, is sublimated but also enhanced by this psychological phenomenon. Where it is not only based on language and culture, but rather on race, it assumes the enduring vital power of nature.[24] Since the international order lacks a centralized law-making and judicial authority, the society of nations, in principle, remains in the natural state of anarchy.[25]

This being so, Huber then analyses why states would still enter into legal relations with one another. He suggests that such a move on the part of states could be based on the existence of various complementary interests (*komplementäre Interessen*) or corresponding purposes (*Übereinstimmung von Zwecken*).[26] He continues by pointing out that every treaty that aims to accommodate conflicting interests has the character of a *do ut des* contract. In ancient times, even peace treaties were of that nature. However, in those early times, when international legal relations were still rare, states did indeed already conclude treaties that provided for rules for their mutual conduct. Yet, the international law emerging from this practice of sovereign states remains positive law devoid of any metaphysical values like, for instance, the idea of justice. However, Huber also recognizes that if ethical postulates have become accepted in the societies of a large number of states, these postulates demand recognition and protection through the international legal order, for instance, with regard to the limitation of means of warfare and the prohibition of slavery.[27] This value-oriented position has not to be seen, though, as a general retreat from his principal approach that international law reflects the egotistic interests of sovereign states.

As already mentioned, Huber changed his position in this respect but not before the interwar period when he redefined law, including international law, in terms of the ethical standards of Christianity.[28] But recognizing that widespread acceptance of certain ethical postulates demands their protection under international law is fully consistent with Huber's other basic position that international law must always be close

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[22] Although Huber had gradually retreated from his earlier power politics approach after the end of World War I, he still held on to the above described position even on the eve of the outbreak of World War II in 1939: see Huber, 'Die Schweiz in der Völkergemeinschaft' (Address of 1939) in M. Huber, *Heimat und Tradition* (1948), at 43 ff; see also Diggelmann, *supra* note 3, at 101.

[23] Huber calls this 'national consciousness', '*die Nationalität*', which has a different meaning from the ordinary meaning of nationality: see Huber, 'Die geschichtlichen Grundlagen', *supra* note 2, at 188.

[24] The German text speaks of '*die nachhaltige Kraft des Animalisch-Instinktiven, Naturhaften*: *ibid.*, at 188.

[25] In his article on the historical foundations of international law Huber emphatically warns against an excessive nationalism: *ibid.,* at 188–189; see also Diggelmann, *supra* note 3, at 102–103.

[26] Huber, 'Grundlagen', *supra* note 1, at 68; the wording clearly shows Jhering's influence here.

[27] See *ibid.*, at 91 ff.

[28] See *supra* note 15.

to its socio-political substrate. Huber correctly observed that the dissociation of law and facts is inherent in the development of law generally and of international law in particular. Just as through the process of civilization, life becomes more complex, correspondence between legal rules and individual cases becomes more difficult. In addition, codification of the law and the increasing sophistication of the professional application of the law contribute to the dissociation of the law from its social substrate.[29]

C *The Historical Development of International Law*

In addressing the second major field of special interest to Huber, i.e. the origins, development and foundations of the binding force of international law, he followed the same method of analysis that he had applied in elucidating the origin and nature of the state. Huber begins his inquiry with a detailed historical review of the development of international law and in so doing he also scrutinizes the socio-political causes underlying the emergence of international legal principles and rules.[30] At the outset, Huber describes – not without a shade of speculation – how the first signs of legal relationships between primitive groups or other entities of higher social integration of later times emerged. As mentioned earlier, peaceful interaction between primitive tribes and peoples occurred in the form of trade, i.e. by way of the exchange of goods on a *do ut des* basis. Treaties on other matters consisted of repeated unilateral promises.[31] Each party to these kinds of treaties appears as an independent entity acting unilaterally. There is no sense of a common legal norm that is binding because of its acceptance. The law of these treaties is not one unified law, but consists of two parallel creations of law with normally complementary contents. Yet Huber states that parties have to have a minimum of shared notions, i.e. the idea of the binding force of the promises as the basis of any contractual commitment. This binding force derives from the sacred rite of the promise.[32] Huber then observes that states took a great step forward when, in addition to the *do ut des*-type treaties, states concluded treaties that did not only express an exchange of legal goods or unilateral promises, but provided for general rules entitling or obliging the parties equally under equal conditions.[33] The upshot of this necessarily sketchy summary of Huber's inquiry into the early periods of intergroup relations – hardly to be called 'international' – is that legal interaction between states or, more generally, social entities requires independently acting entities,[34] a minimum of shared notions regarding the binding force of promises and, in the case of states, complete legal equality as a common legal basis.

The concept of an international law was still not known in the Middle Ages. What did emerge in this period is the notion of a *legal community* embracing occidental Christianity.[35] Christianity constituted an organic entity structured by a hierarchical feudal

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[29] See Huber, 'Grundlagen', *supra* note 1, at 57 ff.
[30] See *ibid.,* at 75 ff; *id.*, 'Geschichtliche Grundlagen', *supra* note 2, at 177 ff.
[31] Huber here refers to a rudimentary Egyptian–Hittite extradition treaty (14th century BC).
[32] Huber, 'Grundlagen', *supra* note 1, at 69.
[33] *Ibid.,* at 71.
[34] *Ibid.,* at 75.
[35] Huber, 'Geschichtliche Grundlagen des Völkerrechts', *supra* note 2, at 179.

order, in which no prince or representative of the estates of the realm was above the law. The notion of an international law had no place in this order.[36] However, the idea of a legal community (*Rechtsgemeinschaft*) persisted through the times of the decline of the feudal order and, thus, in Huber's view was as important an element in the development of modern international law as the requirement of independent actors for the substrate of the international legal order. However important these insights into the roots of international law were the most decisive period, in Huber's view, for modern international law was the transition from the Middle Ages to the so-called early modern times when the Holy Roman Empire began to fade and the feudalistic order was overcome. From the periphery of the Holy Roman Empire, larger nations like France, Spain and England emerged and the central German and Italian parts dissolved in a multitude of small and smaller territorial entities whose princes, inspired by the revitalized Roman law,[37] claimed supreme power or, in other words, complete sovereignty. As Huber dramatically stated: 'The idea of sovereignty in which a strong political power is inherent, liquidated the Middle Ages: the Empire and feudalism.' Thus, the socio-political terrain for the development of a truly international law came into being: a large number of sovereign states, with strong interests in legally secured economic relationships and in safeguarding their exclusive authority over their territories as well as a basic sense of legal community. The concepts of sovereignty and international legal personality became inseparable.

Based on their sovereignty and their exclusive authority over their territories, the monarchical states of the post-medieval period entertained regular relationships that led to numerous bilateral treaties as all public action of states beyond their territory could only be undertaken with the consent of the affected other sovereign, on the one hand, and in support of growing world trade as a core element of the spreading mercantilism. Particularly in the latter field, states set up a highly developed system of commercial treaties in order to secure advantageous trade conditions.[38] A major factor in the development of universal trade was the improvement of the transportation of goods across the seas. Although desirable in the eyes of some seafaring nations, the extension of the principle of territoriality to the seas was not acceptable. Rather, the existence of several states claiming their rights as sea-faring nations made it possible to agree on the freedom of the seas, albeit repeatedly contested by temporarily predominant states. Basically, states of the late 16th, 17th, and even the 18th centuries continued to pursue their individual, predominantly economic interests, i.e. safeguarding their sovereignty through economic self-reliance. The international law of the time reflected this egotistic perspective of states.

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[36] Huber does recognize, however, that the highly developed land and maritime trade of the Italian, Flemish and Hanseatic cities led to stable relationships and frequent international legal acts, particularly in the law of the sea and the law of aliens: see Huber, 'Grundlagen', *supra* note 1, at 78.

[37] Huber relates the concept of sovereignty to the Roman concept of the absolute ownership of property. Sovereignty conferred a similar absolute right of disposition upon the princes over their territories: see Huber, 'Geschichtliche Grundlagen', *supra* note 2, at 180 ff.

[38] Huber, 'Grundlagen', *supra* note 1, at 82.

Yet, from the beginning of this period, Huber observes, forces gradually emerged that expressed the idea of *collective interests* of states. The political and religious as well as the structural changes which occurred following the decline of the medieval order, particularly the creation of a multitude of sovereign states, widened the scope of international politics. More states than ever took an interest in all major international political issues. This development culminated in the Westphalian Peace Congress which, among its many other achievements, gave an all-European character to the foreign policy of all states. But this could not result in the restoration of the all-embracing occidental Christian order. Following the fragmentation of the feudal order and the decline of the Holy Roman Empire, the foundations of a comprehensive state system could only be found in the individual states. This individualistic trend had been predetermined by the entire intellectual development until that time; that is to say, the Reformation, capitalism, and Roman law all called for individual freedom. Religiously-bound Scholasticism was replaced by Rationalism, whose most important creation was natural law.[39] The individualistic character of natural law corresponded with the principle of sovereignty of the modern state. At the same time, however, natural law confronted the state with ethical demands, i.e. it postulated an ethic of international life.[40]

For international law, the new natural law approach meant a complete overhaul as it established a system of legal norms for a field of social relations for which there existed numerous legal relationships but no objective general law. By transferring a system of legal principles that were abstracted from the more highly developed state legal orders, an ideal objective system of international law was established. 'Natural international law is like a natural science working-hypothesis that is used until experiments have put forward sufficient material from which a (scientific) law may be deduced. . . . To the degree that positive rules of law evolved through the development of international relations, the make-shift bridge of natural law could be removed but some pillars of it still remain today.'[41] The development of an ideal, natural international law only partly reflected the international conditions of the 16th to the 18th centuries. Nor was it an expression of a social ideal of ascending classes or states. To its largest extent, it was a purely scholarly or rather a speculative creation based on an *a priori* ethic. According to Huber, it was not until the middle of the 19th century that economic and political development allowed international relations to become accommodated within the international legal system that legal scholars had created. Among the many factors that broadened the basis of international relations and gave rise to new legal developments,[42] Huber lists modern means of production and transportation and the growing international exchange of human and monetary capital.[43]

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[39]   *Ibid.,* at 85.
[40]   *Ibid.,* at 86.
[41]   *Ibid.,* at 87 (translation by the author).
[42]   See, for instance, the extension of the domestic notion of 'public property' to the international level with the result that the freedom of the seas was fully recognized.
[43]   Huber, 'Grundlagen', *supra* note 1, at 88.

D *The Basis of the Binding Force of International Law*

The rather extensive, yet still sketchy, outline of Huber's view of the roots and causes of the development of international law has shown the close interrelationship between the social substrate and international law. Thus, the strong dependence of the formation of law in general and international law in particular on socio-political conditions is also reflected in his approach to the central question of why international law is binding. Huber rejected the positivist position that the binding force of international law derives from the consent of states. He argued that this position rests on the empirically unverifiable(!) assumption that states possess autarchy to a degree that they can freely decide to which binding restraints they want to submit. In addition, the consent theory does not answer the question of why the same states could not revoke their consent. Thus, Huber looks for a concept of international law whose binding force does not exclusively rest on the consent of states. His approach to dealing with this thorny problem is rather complex and multi-faceted. In developing his answer to the question of where the binding force of international law can be derived from, Huber, of course, draws on his findings regarding the role of the state in the historical development of international law. As mentioned earlier, a central finding was that the perennial power struggle between states is a natural given. This empirically verifiable fact appeared to support his position, as Rudolf v. Jhering and Karl Marx[44] had maintained, that law always reflects the existing power relations.[45] This position plays a major role in his argumentation. Furthermore, based on his distinction between 'collective' and 'particular' interests and their reflection in certain international norms, and on his categorization of different types of norms of international law (international law/*Völkerrecht*, international custom/*Völkersitte*, and international morals/*Völkermoral*[46]), he splits up the question of the validity of international law into two separate issues, i.e. the binding force of international law, in principle, and the binding force of concrete norms of international law. Finally, it should be recalled that Huber's argumentation with regard to the basis of the binding force of international law is interwoven with his concept of 'community and society' which he took from Ferdinand Tönnies.[47]

Given the close connection between the creation of law and existing power relations, Huber asks how power relations would have to be so that agreements and international customs – called international law – could become binding international

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[44] See Diggelmann, *supra* note 3, at 108.

[45] *Ibid.*, at 108 with further references.

[46] Huber calls the mostly bilateral treaties particular (international) law from which common customary rules of law can derive. The more uniform these particular rules in these treaties become, the more they express corresponding interests of the states in their international relations. Consequently, norms agreed by treaty can reach universal or near universal validity. Thus, besides the particular interstate treaties and the common customary law there are the normative collective treaties and universal conventions— in modern terms the 'law-making treaties'.

[47] Diggelmann, *supra* note 3, at 113, rightly observes that introducing Tönnies' concept in this context is not fully convincing and will, therefore, not be dealt with in detail.

law. This is the case when a collective interest of the states in the validity of these norms exists.[48] The society of states is characterized not only by the relations between each individual state with every other state. In addition, there has to be an interest of the collective of states in the relations of the individual states; in other words, the collective interest.[49] The decisive point for the existence of a collective interest is that the interests of all creates an effective limit for the pursuance of interests by the individual state. This means that concurrent particular interests can only be carried through within limits set by the interests of all. 'Only if one accepts the existence of a collective interest is it possible to explain that the states of the international community ('*Völkergemeinschaft*') do modify the common law by treaties and agreements, but cannot unilaterally reject this common law.'[50] Huber's concept of a power-based international law comes out very clearly at this point. He emphasizes that the collective interest is the more intense the greater the collective of states is that confronts the particular interest of a state. Thus, it is not surprising that Huber focuses on the special role of the great powers and on the power equilibrium that in his mind are of particular relevance for the weight of the collective interest.[51] On the one hand, the history of 19th-century international relations shows that the major state congresses like the Vienna Congress primarily served the collective interest of the great powers amongst themselves. On the other hand, though, these congresses were also meant to heed the collective interest of the society of states as, for instance, represented by the members of the Pentarchy.[52]

The predominance of the great powers is a factual one, not a matter of international law. At times, however, the great powers attempted to give their privileged status an international law underpinning in terms of a hegemonial order as in the case of the

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[48]   Huber, 'Grundlagen', *supra* note 1, at 107.

[49]   As *ibid.,* at 140, states at later point: '[t]hus, every state—and if only indirectly because of the private interests of its citizens—is interested in the maintenance of normal relations between the other states, and since this interest is the essentially the same for every state, a lasting collective interest comes into being'.

[50]   *Ibid.,* at 107; for Huber 'common law' ('*gemeines*' *Recht*) is the law that is 'uniform' as a matter of law while general law (*allgemeines Recht*) is only *de facto* uniform law, usually a forrunner of the 'common law' development of international law: see *ibid.,* at 72, n. 9.

[51]   See Diggelmann, *supra* note 3, at 110 ff; also B. Landheer, *On the Sociology of International Law and International Society* (1966), at 40.

[52]   Huber, 'Grundlagen', *supra* note 1, at 108; the idea that either a large number of states including great powers or a group of great powers alone could play a leading role in the law-making process was hinted at by the Permanent Court of International Justice in the *Wimbledon* Case which involved the question of the scope of the international régime for the Kiel Canal, PCIJ Judgments, 1923, Series A, No. 1 (Justice Huber dissenting for other reasons); in the *Aaland Islands* Case, the International Committee of Jurists, appointed by the Council of the League of Nations in its Report (League of Nations Official Journal, Special Supplement No. 3 of Oct. 1920) stated that the binding force of the demilitarization régime for the Islands—as set up by a treaty concluded by France, the United Kingdom and Russia in 1856—for third states derived from the character of the régime as law in the interest of the European community of states as it then existed: see J. Delbrück, 'Laws in the Public Interest'—Some Observations on the Foundations and Identification of *erga omnes* Norms in International Law', in V. Götz, P. Selmer and R. Wolfrum (eds.), *Liber Amicorum Günther Jaenicke—Zum 85 Geburtstag* (1998), at 17, 21–22.

Holy Alliance and the Pentarchy.[53] The other factor in support of the collective inter-est is the power equilibrium of the great powers. Its purpose is to prevent power con-centrations that would endanger international peace. Thus, since the middle of the 19th century, the existence of a power equilibrium has made it possible to convene international conferences when important international problems had to be solved.[54] It is in this context that Huber also sees the efforts to create institutions for the peaceful settlement of disputes such as, for instance, the Hague Permanent Court of Arbitra-tion established by the Hague Peace Conferences of 1899 and 1907.[55]

What all of these findings amount to is that, in Huber's view, the predominance of the great powers, and more particularly the equilibrium between them, serve, at least indirectly, the collective interest in the maintenance of the binding force of interna-tional law as this overwhelming collective interest confronts the particular interests of individual states at any time. In other words, Huber's answer to the question of where the binding force of international law can be derived from is that it is the collective interest that generates the binding force of international law.[56] However, this answer applies only to international law as such. The binding force of concrete international legal norms rests on a prior agreement or on custom. Either way, international law is dependent on its socio-political basis and, therefore, Huber insists that an effective international law must not become too dissociated from its underlying social basis.[57]

4 Max Huber's Sociological Approach to International Law and Relations – Its Relevance Today

Assessing the relevance of a scholarly work written almost a century ago is no easy task. Scholars of whatever background, but particularly social scientists and legal scholars, are necessarily exposed to various political and ideological influences of their time. Thus, parts of their scholarly work become outdated irrespective of the merits that contemporaries had attributed to them. Huber's work is no exception in

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[53]   It is interesting to note that Huber found that the failure of those attempts to create a hegemonial world order was due to the fact that the great powers did not sufficiently press for the creation of an organiza-tion that could have sanctioned their hegemony, although he was not particularly in favour of structures superimposed on national governments. Thus, in his analysis of the League of Nations Covenant Huber comments favourably on the prudent approach by the founding members of the League, i.e. that the *voluntary cooperation* of the sovereign nations had been chosen as the basis for the new organization. Anything else would have been out of step with the reality of the prevalent socio-political conditions of the time: see Huber, 'Constructive Foundations', *supra* note 2, at 197 ff; for a similar view of Huber's posi-tion *vis-à-vis* government-like organizations beyond the states see Landheer, *supra* note 51, at 40.

[54]   *Ibid.,* at 199; see also Diggelmann, *supra* note 3, at 111.

[55]   In his later years, Huber became very critical of the Hague Peace Conferences: see Huber, 'On the Place of the Law of Nations in the History of Mankind', in F.M. von Asbeck *et al.* (eds), *Liber Amicorum in Honour of J.H.W. Verzijl* (1958), at 190 ff.

[56]   Diggelmann, *supra* note 3, at 112, correctly finds this line of Huber's argument circular. If the collective interest in the binding force of international law is the source of the binding nature of international law the latter has to be pre-existing because an interest in something cannot exist unless it is already there.

[57]   See *supra* at 104–105.

this respect. For instance, in view of the major structural changes of the international system, particularly after World War II, and the entailing relative reduction of the state's role in international relations, his extremely state-centred perception of international relations has become outdated to a large extent. So too his conceptualization of international law as an exclusively power-based law (*Machtrecht*) has proven to be untenable, as Huber himself acknowledged after the catastrophe of World War I. With hindsight, it is also fairly easy to reveal certain contradictions in his argumentation which, at least in part, may be due to the fact that he consecutively absorbed the work of other scholars into his own writings. Thus, in assessing the relevance of a scholar's work almost a century later, it appears to be inappropriate to single out particular weaknesses – apparent or real – of the work and draw critical conclusions from them. Rather, what is needed is to take a broader view that focuses on the method used by the scholar under review to make his findings – actual or outdated – and ask whether this method is still relevant for an analysis of the present international system and its legal order. As will be shown, this approach not only brings to light the significance of Huber's work as a whole, but also points to some particular observations of the conduct of international relations that appear to be of lasting relevance.

Roughly speaking, Huber's sociological approach to international law is two-pronged. First, there is a strong emphasis on elucidating the history of the development of international law in the context of the prevailing socio-political conditions in the respective periods of history. But this is not meant to be historiography for the sake of historiography. His historical research aims at collecting the material that allows him to understand when and why legal rules for the conduct of intergroup or interstate relations have developed. Second, there is the more specific interest in the question of why and under what conditions legal rules of intergroup/interstate relations become effective beyond voluntary compliance. He identifies power – whether military, political and/or economic – as the decisive factor in upholding the legal order. This led him to his conceptualization of international law as a purely power-based law. As mentioned earlier, his perception of international law was more or less free of ethical values. As he himself recognized later, this perception was not tenable. However, this does not mean that this position on the particular relationship of power and (international) law was and is altogether wrong. Huber actually expressed a lasting insight that law, whether domestic or international, needs a power-substrate to sustain the respective legal orders.

Domestically, power without law leads to tyranny. Internationally, power without law constitutes anarchy or the state of nature in the Hobbesian sense, i.e. the *bellum omnium contra omnes.* And law without power, although binding, is not, in the last resort, enforceable.[58] Huber's further observation is also correct, namely that great powers – not exclusively, but to a considerable extent – play an important role as the power-substrate of international law. However, contrary to Huber's position,

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[58]   See J. Delbrück, 'Right v. Might Great Power Leadership in the Organized International Community of States and the Rule of Law', in J.A. Frowein *et al.* (eds), *Verhandeln für den Frieden—Negotiating for Peace, Liber Amicorum Tono Eitel* (2003), at 23 ff.

the power of the great powers is not the source of the binding force of international law. Nevertheless, his emphasis on the role of the great powers is still highly relevant. Present-day international law shows ample evidence of the relevance of Huber's view. To name but one example: the UN Charter has given the then five existing great powers a privileged status within the Security Council. A clear difference between Huber's original position on the role of the great powers and present-day international law is, however, that the latter is founded on the principle that the present great powers may be privileged but that they are not above the law. Their role is to exercise leadership under law, not above the law.

Another of Huber's lasting contributions is his famous warning that international law – inherently close to the social substrate – must still not become too dissociated from its substrate. This warning is highly topical. The last decades have seen a tremendous increase in international rule-making in practically all fields of human activities. The expansion of international law is, as Huber might have seen it, the natural consequence of the structural changes of the international system and the entailing diversification of its actors. However, there appears to be a danger that at least parts of the rising flood of new law – often aspiring rather than concrete – may lose the necessary social basis and thus its normative effectiveness. But this is not a one-way street. If it were accepted that the law, whether domestic or international, should always be in close correspondence with its social substrate, it would lose its normative function as a primary means for the peaceful change that becomes necessary from time to time in any social system. In the international system, it is particularly important to recognize this since international law has become value-oriented, i.e. an ethical standard-setting legal order as Huber himself acknowledged in his later years. Nevertheless, it is a major and lasting achievement that he introduced the notion of the – one may call it the dialectical – relationship between law and its social substrate into international jurisprudence.

Out of the many other challenging aspects of Huber's work that would need a more in-depth scrutiny than is possible in this article, one final issue will be addressed. At the beginning of this article, the question was raised whether and to what extent Huber envisaged the structural changes that the international system underwent after he completed his major research projects. At the outset, one can say that Huber was not an idealistic visionary as far as the future of the international system is concerned. As he held on to his firm conviction that state egotism is a natural given, he was necessarily sceptical with regard to the possibility of the emergence of a highly integrated international system with states submitting themselves to international organizations embued with the power of deciding major problems by majority vote. He expressly welcomed the fact that the League of Nations Covenant refrained from such a scheme. But as a sociology-oriented realist he did realize that the international system was likely to open up to the recognition of international legal subjects other than states. Thus, he envisaged rather prophetically in his time that international commercial corporations might be treated by states as their equals in the future.[59] Furthermore,

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[59]   See Huber, 'Grundlagen', *supra* note 1, at 88 and 92.

from the same perspective, he also held that it would be economic interests and the needs of states that would induce and support the development of international law – a view that has been fully borne out by history. This is not surprising as his anticipation was based on a careful analysis of socio-political conditions, not on sheer visionary speculation. Thus, revisiting Huber's sociological approach to an understanding of international law does indeed appear to be a worthwhile and fruitful exercise.