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# *An Inquiry into the Turkish 'School' of International Law*

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Çelik, Edip. *Milletlerarası Hukuk*, (International Law) Vols. 1 and 2. Istanbul: Filiz Kitabevi, 1982 and 1984

Pazarıcı, Hüseyin. *Uluslararası Hukuk Dersleri*, (International Law Lectures), Vols. 1 and 2 (2nd ed.). Ankara: Turhan Kitabevi, 1989 and 1990

Eroğlu, Hamza. *Devletler Umumi Hukuku*, (Public International Law) (2nd ed.). Ankara: Turhan Kitabevi, 1984

Toluner, Sevin. *Milletlerarası Hukuk Dersleri—Devletin Yetkisi*, (Lectures on International Law—Jurisdiction of States) (4th ed.). Istanbul: Beta, 1989

Meray, Seha. *Devletler Hukukuna Giriş*, (Introduction to Public International Law), Vol.1 (3rd ed.). Ankara: Ankara Üniversitesi Basımevi, 1968

## **Abstract**

*This paper seeks to examine major Turkish textbooks of public international law, focusing particularly on a small number of core areas in this discipline: historical origins and basic features; formal sources; main subjects; the law of territory; international law and development. These textbooks show a strong inclination towards Eurocentrism and positivism due to their denial of the vigour of 'soft law', as manifested for instance in UN General Assembly resolutions, and of their marginal treatment of 'international law and development'. What is more, substantive issues of international law are not discussed in a critical way; rather the procedures of the discipline are given priority. This is almost to suggest that Turkish international law scholars hold the view that their raison d'être is confined to 'technical expertise', and that the relationship between law, other disciplines and society lies outside their domain. In the final analysis, therefore, the hard core of issues integral to international law and having a deep impact on international politics, such as the search for a New International Economic Order (NIEO), the principle of self-determination and human rights are either entirely bypassed or treated only very narrowly in Turkish international law textbooks.*

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## 1 Introduction

When studying Turkish international law textbooks, one is immediately struck by the apparent interplay between the dominant legal doctrine, legal education and foreign policy in Turkey. The constraints of Turkey's position within international society are also reflected in the substantive and methodological framework of international legal scholarship in Turkey. In line with Turkey's preference for a reactive, pragmatic and pro-Western external posture since the early 1950s, Turkish international law scholars have tended to adopt a conservative and positivistic stance in their treatment of rules, principles and doctrinal conceptions of international law (IL).

This essay reviews major international law textbooks written by Turkish scholars. An analysis of a number of IL textbooks authored by some prominent academics illustrates that they have apparently failed to exceed the boundaries set by classical (traditional) international law. In fact, these academics seem to have largely missed contemporary challenges to established orthodoxies. Issues such as 'human rights', 'principle of self-determination' and 'the search for a new international economic order' (NIEO), which played a major role in the transformation of IL following the Second World War, have hardly found a place in the IL textbooks written by Turkish scholars. This anachronistic and uncritical perspective may of course partly be linked to Turkey's official perspective of international law and society, which prioritizes the Western bloc of nations and its civilizational outlook.

This essay is an attempt to explore the role played by Turkish international jurists *vis-à-vis* the prevailing discourse on Turkey's interaction with international society. The legal behaviour of states cannot simply be explained in terms of their reaction to an external environment. Instead, their behaviour must also be related to those internal factors which prompt states to adopt a particular approach towards international law. Individual nation-states constitute a relatively independent centre of political and legal culture. The 'nationalist discourse' is among the primary instruments through which the state, with its legislature, executive, judiciary and army, seeks to impose its own projection of the outside world on society. However, the state is not the sole institution through which society is presented with a particular image of the outside world. We must also include the media and the educational establishment as nation-wide transmitters of 'knowledge' and imagery. In the present context, the academic profession also plays an important role in developing an understanding of Turkish conceptions and practices of international law.

Rather than investigating the whole range of themes which together form the field of international law, the present study will undertake a review of issues that are indicative of the normative and methodological posture adopted by Turkish publicists. These include the following topics, which are commonly found in international law books: the historical origins of international law; its formal sources; subjects of international law; the law of territory and self-determination; international law and development.

## 2 A Brief Remark on the Development of the International Legal Discipline in Turkey

The study of international law is at a relatively premature stage of development in Turkey. Turkey – or more correctly, the Ottoman Empire – entered ‘international society’ as late as the mid-19th century, when the Ottoman Empire was accepted into the ‘Concert of Europe’. As Pazarıcı, whose IL textbook will be reviewed herein, notes, this date also corresponds to the involvement of Ottoman jurists in international law.<sup>1</sup> At the time, significant portions of international law books, generally in the form of translations or adaptations from European textbooks, were written by Christian minorities.<sup>2</sup>

It was only after the foundation of the Turkish Republic that in-depth studies began to be carried out in the field of international law, as well as in other disciplines. These studies, for the most part, focused on general aspects of international law. Leaving aside doctoral theses by Turkish jurists in European universities, only five studies addressing an international audience had been produced by Turkish scholars by the end of the Second World War.<sup>3</sup>

Following the war a growing number of studies by Turkish IL scholars were published, particularly on matters of general international law and subjects closely related to Turkish foreign policy, such as European Community (EC) Law and the Law of the Sea. However, these studies have not made any major contribution to the discipline, as observed by Pazarıcı. This is evidenced by the fact that only a very limited number of Turkish jurists have been represented in international courts and law commissions.<sup>4</sup>

## 3 An Examination of International Law Books by Turkish Scholars

In this section, I will examine some IL textbooks written by Turkish jurists. The purpose is to show how the present body of international rules and principles are conveyed to the reader. The books are examined both in terms of their substance and methodology. The topics selected for investigation are intended to reveal the prevailing

<sup>1</sup> H. Pazarıcı, *Uluslararası Hukuk Dersleri*, vol.1 (1989), at 65.

<sup>2</sup> K. Mineciyan, *Muamela't-ı Dîvel* (1875); C. Gregor (with K. Paşazade Sait), *Hukuk-ı Dîvel* (1883). Christian minorities tended to have reasonably well-established links with and knowledge of ‘Christian’ Europe on account of their religious affiliation, good schooling and commercial ties with European traders.

<sup>3</sup> Three such studies were undertaken by Ahmet Reşit, who published an article in *Revue générale de droit international public* in 1935 on the protection of minorities in the Ottoman Empire and Turkey, and the other two in *Recueil des Cours de l'Académie de Droit International de La Haye* in 1933 and 1937 respectively. The first of these articles, both of which were initially presented as lectures before The Hague Academy of International Law, was likewise on minorities and the other on Islam and International Law. Finally, an article by Cemil Bilsel entitled ‘International Law in Turkey’ appeared in the *American Journal of International Law* in 1944. None of these scholars, however, came to prominence outside of Turkey.

<sup>4</sup> Pazarıcı, *supra* note 1, at 89.

doctrinal conceptions and normative assumptions underlying what might be called the Turkish ‘school’ of international law. Five major textbooks of international law, written by prominent Turkish IL academics, will be analysed here: Edip Çelik, *Milletlerarası Hukuk* (International Law);<sup>5</sup> Hüseyin Pazarıcı, *Uluslararası Hukuk Dersleri* (International Law Lectures);<sup>6</sup> Hamza Eroğlu, *Devletler Umumi Hukuku* (Public International Law);<sup>7</sup> Sevin Toluner, *Milletlerarası Hukuk Dersleri – Devletin Yetkisi* (Lectures on International Law – The Jurisdiction of States);<sup>8</sup> Seha Meray, *Devletler Hukukuna Giriş* (Introduction to Public International Law).<sup>9</sup> Very few books have been written by Turkish scholars on general international law (nor indeed on specific issues of international law, unless they are in some way implicated in Turkey’s international disputes). The books reviewed here are used as textbooks in international law courses given in the Turkish public universities.<sup>10</sup> To my knowledge, no textbook of international law of any significance has been written in Turkey in the last 10 years or so. It may thus be justifiably claimed that these books are representative of the state of international legal scholarship in Turkey.

A qualification with regard to the last two studies listed above is due here. As is obvious from its title, Toluner’s book has a narrower scope than the others, in that she focuses specifically on the jurisdiction of states. For this reason, her study will be reviewed only in the section on ‘the law of territory’. Unlike other studies reviewed herein, all of which were published after 1980, the volume by Meray was issued in 1968. This discrepancy in dates is important for two reasons: first, the linkage between international law and development was most firmly established after the 1970s; second, the overall influence of non-Western states over the direction of international law and the impact made by revisionist scholars upon the international legal discipline could only be vaguely perceived at the time his book was written. As a result, Meray’s book is only partially representative of the *present* state of international legal scholarship in Turkey. Therefore, greater emphasis will be laid on those textbooks written after 1980. This must be borne in mind when evaluating the assessments made in this article.

## 4 Historical Origins and Basic Features of International Law

Meray and Pazarıcı endeavour to sketch the historical roots of international law. Meray devotes two chapters of his book to an analysis of the historical evolution of

<sup>5</sup> E. Çelik, *Milletlerarası Hukuk*, vols 1 and 2 (1982 and 1984).

<sup>6</sup> H. Pazarıcı, *Uluslararası Hukuk Dersleri*, vols 1 and 2, 2nd eds (1989 and 1990). The revised fourth edition of vol. 1 published in 1994 and the third edition of vol. 2 published in 1993 do not, in any significant way, differ from the earlier editions.

<sup>7</sup> H. Eroğlu, *Devletler Umumi Hukuku*, 2nd ed. (1984).

<sup>8</sup> S. Toluner, *Milletlerarası Hukuk Dersleri – Devletin Yetkisi*, 4th ed. (1989).

<sup>9</sup> S. Meray, *Devletler Hukukuna Giriş*, vol.1, 3rd ed. (1968).

<sup>10</sup> The language of teaching in most of the ‘foundation universities’ (commonly known as ‘private universities’ in international parlance) in Turkey is English. The teaching materials, including those for international law courses, are mostly brought from the US or the UK.

international law. Both of these scholars draw on the nature of inter-state relations in antiquity and medieval times before discussing its formative years from the 17th century onwards. They also draw on the relevant concepts and principles of Islam which we may today associate with 'international law' (Meray: 12–15; Pazarıcı: 35–42, vol. 1). Hence the authors do not omit the experiences of international relations preceding the 19th-century European experience. This is significant because it allows us to go beyond the boundaries of Eurocentric assumptions. To deny that non-Western experiences and contributions can enrich human knowledge about the history of international relations and law is a definite recipe for positivism and parochialism that takes the Western experience as the sole standard by which rules and principles are assessed.

All of the Turkish jurists, with the exception of Eroğlu, inform the reader that international law is of European origin and that its rules developed as an outgrowth of the 'balance of power' in Europe following the Napoleonic wars. To give a few examples, Çelik asserts that 'Public Law of Europe' could not claim universality as it merely reflected the colonial interests of European Powers in the 19th century (Çelik: 2–4, vol.1). A similar case is made by Pazarıcı, who informs the reader that international law has hitherto been an exclusive preserve of the Eurocentric system of law (Pazarıcı: 35–42, vol. 1). Meray, likewise, argues that the mandates system was in fact a legal cloak used by colonial powers to justify their continued hegemony over the mandated peoples, territories, and their resources (Meray: 193). Nevertheless, none of the authors takes this analysis far enough to show the relevance of this Eurocentric origin in the understanding of the basic concepts and norms of international law. Pazarıcı, like others, shies away from drawing on the impact of European colonialism on the conceptual framework and normative assumptions of classical international law. For his part, Eroğlu is dismissive about the whole issue. Without providing any context within which to trace the historical origins of international law, he restricts himself to a description of rules and institutions governing international relations, all within a formalistic framework. Eroğlu also refrains from questioning classical international law's claims of universality (Eroğlu: 1–23).

With regard to the evolution of international law in the 20th century, typically Eroğlu remains indifferent to the historical changes that have played a crucial role in the transformation of international law in the last century. Çelik takes up the issue by referring to the following developments as the new challenges to classical international law: the decline of European colonial powers after the First World War, in particular, Britain and France; the socialist revolution in 1917 in Russia; the experience of Nazism and Fascism in Europe after the First World War, which revealed the inadequacy of international law in securing peace; the experiences of decolonization after the Second World War (Çelik: 4–6, vol. 1).

Although Çelik does take notice of these new challenges to classical international law, he fails to elaborate on them. For instance, he goes so far as to recognize that the Soviet Union, while initially partially rejecting international law, which in its view had been reminiscent of capitalist/imperialist hegemony, gradually undermined some of the basic doctrines and rules of the 'old' law. However, he does not go into

any detail on this, and nor does he illustrate the relevance of this development to our understanding of contemporary international law (Çelik: 27–38, Vol. 1). Eroğlu is totally dismissive of the ‘progressive’ forces within the discipline. As a result of this anachronistic approach, the author does not examine issues like ‘the protection of human rights at the international level’ or ‘the principle of self-determination’. In contrast to Eroğlu, Pazarıcı does tackle these issues. He draws the reader’s attention to the changing structure of international society and the emergence of new issues as a relevant dimension of international law, as in the case of ‘human rights’ and ‘the protection of the environment’. However, although Pazarıcı speaks of the impact of the Third World on the functioning of the United Nations, he does so briefly and without focusing on the problematic confrontation between the North and the South (Pazarıcı: 51–58, Vol. 1). Nonetheless, this work should be welcomed as one of the first attempts by a Turkish jurist to come to grips with the Third World dimension, albeit merely in the context of the United Nations.

It may be asserted, in conclusion, that it is difficult to pinpoint a common attitude among Turkish publicists regarding the historical origins and general characteristics of contemporary international law. While Eroğlu seems to align himself with ‘conservative positivism’, with total indifference towards the historical dimension of international law, this is less true for others. They are aware of both the Eurocentric origins of classical international law and of the current challenges to that system of law. Nonetheless, with the exception of Meray, they fail to elaborate on these themes or on their relevance to international law today.

## 5 Formal Sources of International Law

With the exception of Meray, the authors under consideration take the conventional route of leaning heavily on treaties and customary international law as sources of international law, examining them from a formalist perspective. For instance, when dealing with treaties, they describe the legal procedures which give them their binding effect. There is hardly any discussion of the actual operation of international treaties. Similarly ignored is a doctrinal – not to mention jurisprudential—analysis of the formal sources of international law.

We may begin with Meray, who appears to be most aware of the emerging trends. When examining the legal sources of international law, the author includes the general principles of international law as well as secondary sources such as court decisions and doctrinal writings (Meray: 92–106). While Eroğlu totally overlooks sources other than treaties and custom, Pazarıcı and Çelik draw on the general principles of law, judicial decisions and scholarly writings as relevant sources of international law. However both of these scholars fail to mention principles such as self-determination, respect for human rights, international cooperation, and good faith, although they have played a significant role in contemporary international society (Pazarıcı: 216–224, vol. 1; Çelik: 165, vol. 1).

The question of the formal sources of international law is no doubt a much more highly disputed issue than these Turkish textbooks would suggest. In the aftermath of

decolonization, for example, some newly independent states asserted that they should not be bound by customary law as they had played no part in its development. Moreover, Third World countries were behind the movement to have a wide range of resolutions in various bodies of the UN, especially in the General Assembly, considered as a legitimate source of international law with binding force.<sup>11</sup> Despite this and with the exception of Meray, the scholars under examination do not involve themselves in these controversial issues. When they do go beyond the letter of Article 38 of the Statute of the International Court of Justice, it is by noting in passing that, because of sharp economic and social changes in the 20th century, customary international law has increasingly been replaced by international treaties. This, however, is hardly a very daring statement and serves only to obscure the role of UN resolutions.

Today the political, ideological and ethical sources of international law are no longer limited to a particular group of nations. Indeed, it is now generally recognized that classical international law, far from being universal, was simply a response to the dominant ideas of a particular period – at the time of the industrial and commercial expansion of Western powers in the 18th and 19th centuries – in European history. Therefore, contributions made by the non-Western community of states are welcome since they bring the idea of a universal system of law closer to reality. This is the context in which the novel concepts and legal materials introduced by various regional, ideological and political groupings in our present century should be evaluated. We will later see how, alongside the Communist bloc of countries, the challenge posed by the Third World countries which are linked by some common or shared historical experiences and/or by poverty,<sup>12</sup> has transformed the normative assumptions of classical international law.

In the face of the apparent multiplicity of approaches to international law, the Turkish jurists, Meray aside, continue to treat their discipline as a unified, cohesive and universal body of rules against which the non-Western opposition constitutes a 'marginal' posture. Hence, for these scholars, if a particular rule or principle is rejected by Western states and/or if it does not conform with the Western mode of law-making (unanimity, precision, and so forth), then it must be dismissed as 'non-legal'.

## 6 Subjects of International Law

The sphere of international law has been rapidly expanding to cover new fields of human activity, causing international law to embrace new actors which had hitherto been hidden by state sovereignty. It would surely be anachronistic to deny that there might be subjects, meaning actors, other than states in international law today, or

<sup>11</sup> Green, 'The Raw Materials of International Law', 29 *ICLQ* (1980) 187, at 189–190.

<sup>12</sup> McWhinney, 'Comparative International Law: Regional or Sectorial, Intersystemic Approaches to Contemporary International Law', in R.-J. Dupuy (ed.), *The Future of International Law in a Multicultural World*, from a Workshop organized by the Hague Academy of International Law in 1983 (1984) 221, at 223–225.

say, 20 years ago. To begin with, Meray appears more in tune with contemporary developments than the rest of the authors under consideration. In addition to states, the author gives an account of international organizations, certain political communities short of statehood, and individuals among subjects of international law (Meray: 135–136). Indeed, an entire chapter is devoted to an analysis of the status of individuals under international law. Having examined various categories of international crimes, such as slavery, piracy, war crimes and genocide, which might be committed not only by states but also by individuals, the author argues that in some cases individuals are also accountable under international law (Meray: 232–236). The specific international protection of minorities, refugees and stateless persons also indicates, according to the author, that individuals can qualify for subjecthood under contemporary international law (Meray: 237–250). Meray's extensive focus on individuals is clearly a novelty in so far as Turkish textbooks of international law are concerned (Meray: 229–263).

Similarly, Pazarıcı notes that the view that states are the sole actor of international law has become outdated as a result of certain progressive developments within the community of nations. He stresses that not only states but also international organizations and individuals can be singled out as subjects of international law (Pazarıcı: 1–3, Vol. 1). As a progressive step, Pazarıcı examines the principle of self-determination as the new criteria – albeit a controversial one – that enables new states to emerge. I shall return to this theme in the next section.

Pazarıcı and Eroğlu both examine various forms of limited statehood which are no longer in existence. Neither the 'mandates system' nor 'the regimes under trusteeship' are in operation today. 'Vassal regimes' and 'the protectorates' also belong in the past. Similarly, cities like Danzig, Saar and Trieste are no longer under international status<sup>13</sup> (Pazarıcı: 112–119, Vol. 2; Eroğlu: 114–124). The criticism here is not that they are irrelevant *per se*, but that their inclusion in a contemporary analysis of sovereignty and statehood is slightly anachronistic. One could assume that these issues have become topical, given that Kosovo has been under an international mandate since the end of the 1990s, and East Timor gained independence from Indonesia in 2002 following a transitory arrangement on the basis of a UN mandate. However, all of the books under review were written *before* the creation of special regimes for certain places given international status under international administrations.

Another similarity between Pazarıcı and Eroğlu lies in their treatment of the 'mandates system'. The authors merely present the relevant provisions of the UN Charter on the rules governing mandated territories. Neither of the jurists make any reference to the political/economic context in which these rules were adopted and put into operation, nor the way in which they were actually implemented. Moreover, Eroğlu goes as far as employing the term 'under-civilized' for peoples who lived under mandatory regimes in Asia and Africa. The two authors similarly manifest a Eurocentric attitude in relation to 'the territories under trusteeship'. This suggests

<sup>13</sup> However, in the 1993 edition of vol. 2, Pazarıcı devotes less space to these *sui generis* regimes.

that the authors have no qualms about the legitimacy of the mandates system (Pazarıcı: 115–119, Vol. 2; Eroğlu: 119–123).

Unlike Pazarıcı and Eroğlu, Çelik observes that the mandates system was established by the victors of the First World War to rule over the territories formerly governed by defeated powers – the Ottoman Empire and Germany. The author dismisses the British and French claims that the mandated peoples were incapable of governing themselves. Furthermore, drawing on their actual functioning, he raises serious doubts as to whether the populations living under the mandates system gained any benefits from it (Çelik: 234–237, Vol. 1). Çelik's critical stance also prevails over the subject of 'recognition'.

For his part, Eroğlu refuses to identify individuals as relevant actors in international society. He does not even make reference to individual criminal responsibility under international law, as has evolved since the Nuremberg trials of 1945. Instead he focuses on various international organizations by simply informing the reader of their purported objectives and of the institutional machinery devised to implement those objectives (Eroğlu: 135–168). In the end, the reader is left wondering what the actual role of international organizations might be and what the author thinks of them.

This formalistic/technical mode of analysis is also adopted by Pazarıcı. He ignores the historical background and the political/ideological forces that have shaped the formal framework of international organizations. He is merely descriptive in his handling of the issues. The author takes for granted the rules and institutions of international law. He narrates the technicalities of his subject from a Western positivistic perspective. Pazarıcı seems to ignore the fact that, despite their formal equality, some states are 'more equal' than others in the decision-making forums of certain international organizations, like the International Monetary Fund, World Bank and the UN Security Council. For the author, it seems that this is 'natural' (Pazarıcı: 119–160, vol. 2). Here I am not simply questioning his moral standpoint, but am criticizing Pazarıcı for ignoring the background necessary for an understanding of why some states hold a privileged status in the decision-making bodies of key international organizations. As a result of this uncritical approach, the reader is bombarded with mere information that lacks the kind of critical insight necessary to comprehend the issues at stake.

A similar attitude prevails over Pazarıcı's treatment of human rights issues. He makes no comment on the implementation of human rights provisions by states which have adopted them. For instance, while noting that Turkey did not sign the Covenants on Civil and Political Rights, and on Economic, Social, and Cultural Rights at the time of their adoption by the UN General Assembly in 1966, Pazarıcı does not explain why. It seems that Pazarıcı does everything possible to avoid being involved in politically 'sensitive' issues. Instead, he seeks to justify the Turkish position and deny the legal effect of these instruments.<sup>14</sup> The author also dismisses the Universal Declaration

<sup>14</sup> Turkey eventually became a party to the two covenants after their ratification by the Turkish Parliament in 2004.

of Human Rights (1948) as ‘non-binding’, without discussing its political and moral force, a particularly notable omission as it was unanimously adopted by the General Assembly.<sup>15</sup> In order to strengthen his argument, the author does not hesitate to pursue an eclectic attitude by making use of the socialist doctrine of international law – as professed by the communist states, particularly the Soviet Union, which were reluctant to accept the ‘internationalization’ of human rights for fear, among others, of its being used as a pretext for Western interference in their domestic affairs (Pazarıcı: 203–223, vol. 2). In fact, the major assumptions of socialist doctrine contrast with a positivist concept of international law, which the author seems to advocate throughout the book. This example demonstrates that Pazarıcı lacks a coherent and well-formulated analytical approach, which could prevent him from inconsistencies and, at times, contradictory statements.

We may conclude that there is a growing awareness among Turkish publicists, though this does not include Eroğlu, that the field of international law has extended to cover international organizations, various social groups and individuals as subjects of international law. However, their analyses generally remain at a purely legalistic and descriptive level.

## 7 The Law of Territory

International law does not make any distinction as to whether a polity claiming sovereignty and seeking recognition is a legitimate representative of the people, unless it relates to colonial rule, racist minority regimes or foreign occupation. It suffices that the claimant is effectively controlling a clearly defined territory and its population. This principle of ‘effectiveness’ is a result of the Eurocentric origins of international law, which was initially premised on the then existing balance of power. These ideas came about as a result of the need on the part of the colonial powers in Europe to set up a system of law to legitimize the status quo and to demarcate the territorial limits of their colonial expansion. In this context, ‘*terra nullius*’, the designated term for any piece of land without a possessor, was transposed to describe the non-European territories inhabited by tribal groups with distinct forms of political administration. Definition of these territories as *terra nullius* meant that the occupation and effective administration of these territories by colonial powers were sufficient for the occupier to claim sovereignty under international law.

This theme is taken up by Çelik and Pazarıcı. Çelik rejects the idea that societies in those territories labelled by colonialists as *terra nullius* were lawless. He argues that this was a gross distortion of reality. They had, like any society, a different set of rules and an administrative framework to govern relations between the members of their community. Therefore, for this author, acquisition of these territories by certain European powers was nothing other than a ‘conquest’ (Çelik: 18–21, vol. 2). Pazarıcı draws on the historical experience of Western colonialism after the so-called ‘discoveries’

<sup>15</sup> South Africa, Saudi Arabia and some Socialist states abstained however.

of other continents from the 15th century onwards. Just like Çelik, this author notes that the term *terra nullius* was a legal cloak used by the colonizers in order to occupy the territories of so-called 'primitive' people who supposedly lacked a proper political and social organization (Pazarıcı: 237–240, vol. 2).

Leaving aside historical issues, both Pazarıcı and Çelik focus on the national jurisdiction of states and the limitations posed by international law. They also summarize the doctrinal discussions regarding the nature of relations between a state and its territory. These authors, as well as Eroğlu, examine the legal requirements for the creation and extinction of states (Eroğlu: 124–134; Çelik: 7–73, Vol. 2; (Pazarıcı: 6–58, 234–245, vol. 2). As usual, these themes are investigated from the perspective of classical doctrine on the law of territory. Furthermore, they do not discuss the doctrinal conceptions behind this methodological framework.

Meray is the only author in the group under study who discusses the doctrinal conceptions behind the classical law of territory. Indeed this author brings to light the legal foundations of the jurisdiction of states over their territory and population. In this context, he presents a brief summary of the arguments made by various schools of thought for an explanation of the doctrinal conceptions upon which the law of territory is based (Meray: 143–146). The author does not fail to discuss the principle of nationality and self-determination when accounting for the population factor as an essential component of statehood (Meray: 138–143). His analysis of the question of self-determination draws both on its evolution during the League of Nations and the United Nations eras, as well as on decisions of international courts and scholarly writings on this principle (Meray: 139–143). Finally, when discussing types of statehood, he draws on some non-Western cases too (Meray: 168–171).

The other jurists, however, simply take for granted the classical doctrine, premised on the principle of effectiveness. No attempt is made to discuss its origins or its implications for contemporary international law. Furthermore, no mention is made of contemporary challenges to the classical notion of exclusive sovereignty exercised by states. This anachronistic approach inevitably limits further inquiry into substantive issues, such as the question of legitimacy and the question of whether a people could have a right to self-determination under international law.

Toluner's book is a case in point. This author focuses on the jurisdiction of states in the context of the law of territory. Chapter 2 of her book deals with the acquisition of territory under the 'old' international law, which was largely premised on the principle of effectiveness (Toluner: 5–22). However, she does not devote as much space to the contemporary legal and political criteria for the acquisition of territory or qualifications for statehood. Nor does she mention that the principle of human rights and the protection of minorities have limited the scope of exclusive jurisdiction enjoyed by states. She also fails to discuss the implications of the principle of self-determination for disaffected minorities. Instead, noting that the principle of self-determination precludes secession, she refrains from further analysis. Hence, for this author, self-determination is no longer applicable, since its sole objective was to authorize the independence of peoples living under the colonial yoke. Its relevance today largely derives from its affirmation of the principle of non-interference (Toluner: 27–30). As

a result, she devotes only four pages to self-determination out of a book of 400 pages.<sup>16</sup> Here the author tries to get round the subject, since she presumably fears that a less state-centric perspective could play into the hands of the ‘separatists’, so to speak, in Turkey. At least some segments of Kurdish society have, for at least two decades, either resorted to the language of self-determination for Kurds and/or asked for minority rights. Turkish jurists have either overlooked the issues of self-determination and minority rights in international law textbooks or, as in the case of Toluner, have denied their relevance in non-colonial situations. This traditional view is of course in line with Turkey’s official policy in these two areas.

To conclude, then, it appears that ‘the law of territory’ is treated by Turkish jurists as an exclusive preserve of the state. International law is accordingly assigned an abstract, formal function of reaffirming the existence of states and endowing them with certain rights and duties. Issues of substantive significance which relate to the relationship between the state, territory and people are dismissed as ‘irrelevant’. This analytical framework is a far cry from the realities of an interdependent international system in which international law increasingly permeates the municipal laws of states.

## 8 International Law and Development

Whatever the position of international lawyers on these issues, it is clear that the notion of ‘development’, from the 1970s onward, has been incorporated into the fabric of international law. This is not, however, to deny that the demise of the socialist bloc and the move towards the free market economy on a global scale in the early 1990s took most of the steam out of the search for a NIEO. Even members of the developing world have been striving to integrate their economies into the dominant international structures such as the World Trade Organization (WTO) and the World Bank. The confrontational language of the 1970s and 1980s has apparently given way to a more conciliatory tone as far as the North–South (rich world v. poorer world) relations are concerned. The Third World, it would seem, has decided to accommodate itself to the forces of globalization, after having lost its traditional ally, the socialist bloc under Soviet leadership. In spite of these notable changes, the problem of underdevelopment continues to stand as a topical issue requiring international cooperation. There are still countless people living in dire poverty. Notions like ‘positive discrimination’ and the ‘right to development’ still underlie much of the debate between the Third World and the West in international forums, such as the United Nations and the WTO.

The IL textbooks reviewed in this essay were all written at a time when the search for a NIEO was proceeding in full speed.<sup>17</sup> However, even if we assume, probably

<sup>16</sup> The 1996 edition of Toluner’s book is almost identical to the 1989 edition; therefore the new edition does not merit a reconsideration of these issues.

<sup>17</sup> Again, as the later edition of Toluner’s book incorporated very few changes, it is not necessary to analyse the book in terms of, *inter alia*, novel developments and approaches *vis-à-vis* international law and development.

rightly, that the search for a NIEO has to some extent subsided since the early 1990s, this should not lead one to disregard the 50-year Third World struggle to increase its share of wealth produced in the world. One cannot deny, even today, that the 'international law of development' keeps challenging certain principles of classical international law, in particular, the principle of equality and its corollary, reciprocity. Poor nations are not satisfied with a 'formal' equality without any material basis, but seek the active involvement of international law in reducing the disparity between rich and poor nations. This may imply the setting aside of the principle of equality of rights and obligations in favour of 'positive discrimination', granting of financial aid, technological assistance, and so forth. Although, as noted earlier, ideas about development and international law have been on the retreat since the 1990s, they remain among the fundamental tenets of international discourse in international economic relations. Therefore, it is natural to expect that the relationship between international law and development should find a place in Turkish textbooks of international law.

Typical of his general treatment of the subject, Eroğlu sticks to the classical doctrine, and totally dismisses 'international law and development'. Çelik, meanwhile, while ignoring this subject, makes some observations with regard to the question of 'state succession', some aspects of which may be related to the economic problems of newly independent states. The author criticizes these scholars who examine this matter – state succession – from the standpoint of the ex-colonial state. He argues that the process of decolonization has become a general feature of international law. Therefore, in order not to be trapped by the classical doctrine, jurists are bound to focus on the 'new' state (Çelik: 272, Vol. 1). In this context, the author takes an anti-colonialist/anti-imperialist stance on the theme of 'state responsibility'. He notes that the treaties of succession between the ex-colonial state and the newly independent state are often rendered meaningless as a result of the concessions received by the former from the latter – the 'cost of independence'. He therefore questions the legitimacy of these agreements. Further, he points out that the constitutions of newly independent states were in effect often drafted by the former colonial masters who were keen to secure their privileges. The author, however, notes that the works of codification by the UN on 'state succession' and 'state responsibility' have radically transformed the rules of the previous regime. The author welcomes the new developments, which he perceives as being beneficial to the newly independent states (Çelik: 315–319, Vol. 1).

However, the progressive posture adopted by Çelik in relation to these specific issues falls short of concern for 'development law' as such. We may assume that he does not regard the UN resolutions on this question as being binding, in line with the dominant technical-positivist stance. If this is the case, then we can confidently assert that he is attached to a positivistic conception of law, which draws a sharp distinction between 'hard' law and 'soft' law.

Pazarıcı seems at least marginally more interested in legal developments towards the establishment of a better international economic order. Pazarıcı's treatment of the issue is noteworthy for his highlighting of the principle of 'positive discrimination',

which, according to him, is designed to contribute to the protection of poor nations against the industrialized rich (Pazarci: 24–25, vol. 2). This, to my knowledge, is one of the first attempts by a Turkish publicist to recognize the existence of an exception, sanctioned by international law, to the conventional principle of ‘equality’ and ‘reciprocity’. Though he merely ‘states’ its existence without further elaboration, this ‘new’ approach may set a precedent for future studies in Turkey. The author also makes reference to the principle of ‘permanent sovereignty over natural resources’, when examining the body of rules relating to sovereignty (Pazarci: 28–29, Vol. 2).

Broadly speaking, then, Turkish jurists have not yet come to recognize ‘development law’ as a corpus of international law. While ‘radical’ lawyers, particularly in the Third World and the (former) socialist states, show a great deal of interest in the development of the normative aspects of law, Turkish IL scholars are attached to a positivistic tradition which insists on a detailed and precise formulation for legal rules in order to gain mandatory force. Hence, given that the resolutions adopted in response to the development problems of poor nations do not conform to the Western standards of law-making, they are ignored by Turkish scholars.

## 9 An Overview of the Methodological and Substantive Analysis

The authors under consideration are, by and large, aware of the Eurocentric origins of international law. While both Meray and Pazarci draw on the rules, principles and functions manifested in different geographies and epochs before the onset of classical international law from the 17th century onwards, this does not prevent these scholars, and the others under study, from drawing almost exclusively on Western legal experience and practices in their analysis of the relevant issues. These textbooks rely almost exclusively on Western scholars, materials and approaches. This bias is of course unjustified in an increasingly international society.

In addition to an uncritical acceptance of the European legal tradition as the sole framework of inquiry, Turkish scholars of international law tend to embrace positivism in apparent oblivion to other approaches to international law. Not unexpectedly, therefore, they tend to limit themselves to what ‘is’, without in any way engaging the corpus of international law normatively or critically. As a result, international law in Turkey has remained a highly technical discipline with its own hierarchical and formalistic framework. Turkish academic thought lags behind modern theories of the sources of international law, for example, by failing to concede any legal consequences to resolutions of the General Assembly, even for states that have voted in the affirmative. This conceptual and methodological framework inevitably leads to an outmoded conception of international law which is frozen in its formality and neutrality. This is in stark contradiction with an understanding of international law, as a dynamic process in which the changes in economic and social structure in international society find their expression.<sup>18</sup>

<sup>18</sup> M. Bedjaoui, *Towards a New International Economic Order* (1979), at 106–109.

Hence, I would assert that the relative weakness of the international legal discipline in Turkey is due to the inability and/or unwillingness of legal scholars to come to grips with the evolution of law. To put it more explicitly, in the Turkish case, legal science is reduced to the mechanical description of an existing body of mostly conventional topics without due regard to the dynamics of international law.

Not unpredictably, then, as far as the academic establishment is concerned, international law discourse in Turkey has thus far failed to come to terms with contemporary problems and trends in international society. Turkish publicists tend to adopt a kind of analytical method which ignores the economic, social and political context in which legal standards evolve. As a result, a large number of themes which are vital to the exploration and explanation of international law are left unexplored: What, for instance, is the historical background to the emergence and development of international law? What were the economic and political interests behind a 'Eurocentric' international law? What are the distinctive contributions of 'progressive' trends on the conceptual and doctrinal framework of international law? How can we explain the relationship between 'international law and development' as an expanding discipline within international law? Moreover, they do not seek to understand what part, if any, international law plays in the actual conduct of international relations. In the Turkish tradition, this has largely been left to international relations specialists. Instead, the choice of topics generally centres around the rights and duties of sovereign states and international organizations. Only a small segment of contemporary issues – issues which do not smack of 'politics' – are incorporated into the analysis of international legal rules and principles, such as 'the protection of environment' and the new 'law of the sea'.

## 10 Conclusion

It appears that Turkish academics of international law and international relations generally lack a tradition of critical scholarship. Their analytical and normative frame of reference is based on acceptance of the notion that Turkey is part and parcel of the European – or Western – state system, which then relegates the non-Western world into a secondary status. This is premised on a belief that Turkey's official policies towards the outside world are essentially as 'correct' as they are 'desirable'. The analytical attitude of Turkish publicists is largely informed by Eurocentric assumptions. Law is perceived in its technical formality and procedural dimensions, without much attention to its substance or context.

The following observation by a Turkish sociologist on the state of the social sciences in developing countries experiencing a process of modernization equally applies to the state of international legal scholarship in Turkey. She asserts that the uncritical transmission of 'knowledge'

becomes more important than to analyse, to think and to discover new relationships . . . because of the dominance of scholasticism, the most striking characteristic is the extraordinary weight given to teaching, on the one hand, and the low quality and the limited amount of research,

on the other . . . Repetition of dated knowledge, as in scholastic teaching, continues to be considered appropriate.<sup>19</sup>

Indeed, broadly speaking, for their part, Turkish academics of international law have been unaware of, or indifferent to, the actual or potential role played by international law in contemporary international relations. As a result, Turkish jurists have failed to play a critical role in the dissemination of legal knowledge, and, instead, have remained as uncritical transmitters of often outdated standard textbooks written by Western scholars. Though often not clearly discernible, the theoretical/ideological position of Turkish academics of international law can be defined as ‘positivism’ of a conservative type. The international law establishment in Turkey considers that it is taking an apolitical stance towards legal scholarship. In practice, however, it is hard not to see that this stance is profoundly informed by deep ‘ideological assumptions’ about the nature of law and society. Their assertions about the rules and basic assumptions of international law are not necessarily universally valid and good for international society. They merely propagate a particular model of doctrine – Western positivism – which claims to provide a minimum of standards necessary for the conduct of international relations.

The uncritical stance of Turkish international lawyers cannot be understood without examining certain non-academic factors. Members of the universities in developing countries are also members of the elite.<sup>20</sup> This assertion is particularly valid for Turkey, where academics of international law are also often employed as functionaries of the state. Most of these scholars are legal advisers and/or representatives of the Turkish government in international organizations. Therefore, they are either ideologically aligned to the official establishment or are unwilling to resist official policy. This is inevitably reflected in their studies. Since they see themselves as state advisers/employees, they tend to be pragmatic and nationalistic rather than theoretical or critical. It is therefore not surprising that they frequently refrain from ‘stirring up’ politically ‘sensitive’ issues which might undermine Turkey’s official position on various questions of international law.

Also of particular relevance is Turkey’s experience of statehood. It is generally agreed that in newly independent states or in relatively young ‘nation-states’, such as Turkey, academics in social science fields often find it difficult to adopt a critical approach on the politics, economic and social system or foreign policy of their countries. Given that in such countries, even more than others, national unity is very much a work in progress, there is always a likelihood that the non-conformist researcher will be accused of undermining ‘national interests’, ‘national unity’ and other perceived ‘high interests’ of the ‘nation’ or the ‘state’. For instance, in the specific case of foreign policy, scholars of international law and relations are expected to support, or at most suggest, minor modifications to, official policies. This fact, coupled

<sup>19</sup> Kiray, ‘Teaching in Developing Countries: The Case of Turkey’, 31 *International Social Science Journal* (1979) 40, at 42–43.

<sup>20</sup> *Ibid.*, at 44.

with the lack of democratic traditions in most developing countries, tends to create a docile and non-critical tradition of scholarship in those countries.

In the light of the analysis undertaken here, we might assert that the international law and international relations scholars may find it difficult to enjoy the 'luxury' of being critical and argumentative, for fear that this might undermine Turkey's official policies and, therefore, its 'national interests'. Indeed the fact that an exclusive weight has been accorded to the Western group of states in the formulation of Turkish foreign policy, is partly to account for the formalistic/conventional attitude of Turkish IL scholars. Although one might argue that the methodological framework of IL books written by Turkish scholars is hardly relevant to Turkey's priorities and aspirations as a developing nation, it is also clear that this frame of analysis with its Eurocentrism and positivism coincides with Turkey's official policy of alignment with the Western group of countries. In other words, instead of taking a critical attitude towards existing policies, the Turkish academic establishment seems to have reproduced and reinforced the dominant discourse on Turkish foreign policy.

