Introduction

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Purpose of the *Companion*

From an exotic specialisation on the fringes of the law school, international law has turned during the twentieth century into a ubiquitous presence in global policy-making as well as in academic and journalistic commentary. With internationalisation first, globalisation later, questions about the legality under international treaties or customary law of this or that action were posed with increasing urgency in the media and by citizen activists as well as by governments and international institutions. International law exited the chambers of diplomacy to become part of the debates on how the world is governed. With good reason, the last ten years of the old millennium were labelled by the United Nations General Assembly the 'Decade of International Law'. The decade saw such impressive developments as the establishment in 1995 of the World Trade Organisation (WTO) with a powerful system for settling trade disputes. In 1998 the Rome Treaty was adopted that led to the setting up of the International Criminal Court (ICC) to try suspected war criminals and those committing grave violations of human rights. The system of multilateral human rights and environmental treaties expanded and, as many said, henceforth needed more deepening rather than widening. The UN Security Council arose from its Cold War slumber to take action in many regional crises, sometimes with more, sometimes with less success, but always surrounded by much legal argument. Cooperation in development and in the organisation of international investment took a legal turn: the rhetoric of 'rule of law' penetrated everywhere. The same trends continued in the first decade of the new millennium. At the same time, however, new concerns emerged. Violations of human rights and humanitarian law kept occurring, especially in the Third World but also in Europe, while only little progress was attained in the eradication of poverty and global economic injustice. Some activities led by the Great Powers such as the bombing of Belgrade by the North Atlantic alliance

(NATO) in 1999 or the campaign to oust Saddam Hussein from Iraq's leadership in 2003 became the subject of heated debate. The relationship between the fight against terrorism and the protection of human rights divided opinions in Europe and elsewhere. While the number of democratic countries increased, democracy also brought popular restlessness and conflict out in the open. If international law was rhetorically ever-present, it was often hard to say what its actual impact in the various situations had been.

In the nineteenth and twentieth centuries, foreign policy 'realists' routinely claimed that international law had a role only in affairs of minor importance. When matters of vital interests emerged, exit the lawyer. This is plainly no longer the case. Law participates in practically every single important aspect of foreign policy and international government. In 2009, for example, the International Court of Justice (ICJ) gave an advisory opinion on the legal status of Kosovo and in 2011 the International Criminal Court indicted Colonel Ghaddafi for suspicion of having committed crimes against humanity against his own population. It has become part of the routine vocabulary through which not only lawyers but journalists, political activists and citizens generally view what is going on in the world and hope to determine what attitude to take in respect of some recent development.

In this *Companion*, the editors have sought to provide an introduction to international law directed not only to lawyers but to academic and professional audiences generally, including non-specialist readers keen to form an overall view of the subject or to explore some aspect of it perhaps related to their own work or, perhaps more generally, to form a reasoned opinion on some matter of international interest. By preparing a volume that goes beyond a mere repackaging of existing materials we have aimed at a politically and historically informed account of the role of international law in the world.

As editors, we have pooled our different orientations to and intuitions about international law to convey both traditional and critical understandings of the field. In our telling, international law may be understood as 'law', with the capacity to regulate relations between states as well as between states, peoples and other international actors, but it is also recognised as a language of government in certain contexts, as a bundle of techniques, and as a framework within which several (modern and post-modern) constructivist projects are articulated. We have consequently selected four general

themes to operate as 'windows' from which to approach the substance of international law. Each of them brings into visibility some aspect that we regard as important. We have been lucky in receiving the assistance as authors of some of the most talented and innovative international lawyers active today, each bringing to this project their distinct interests, preferences and outlook on the materials they have been asked to treat.

The first 'window' is provided by the *contexts* in which international law operates – that is to say, the worlds of diplomacy and ideas as well as its being also 'law'. The second 'window' is opened onto *statehood.* International law, after all, undoubtedly arose with modern statehood and its operation has been linked with the expansion of the idea of sovereignty around the globe. At the same time, however, these linkages have been questioned as morally and functionally doubtful, and we have sought to highlight the relevant debates. But international law is also a professional technique that is operative in typical institutional situations or 'arenas', and accordingly a special section is devoted to those *techniques and arenas* as well. Last but not least, international law is a vehicle through which different actors push their political, economic, ideological and other '*projects*'. It is not just a neutral technology of government but involves sometimes passionate engagement by those who have recourse to it. The fourth section is an exploration of some of international law's most important projects today.

Contexts of international law

One of the ambitions of this *Companion* is to highlight the variety of the professional, practical and literary contexts in which international law appears, the many vocabularies in which it is spoken and the plurality of meanings it carries. Often less technical and more immediately connected with political ideas and forms of social contestation than other legal disciplines, international law is invoked in the settlement of inter-state conflicts as well as in philosophical debates about perpetual peace. It is invoked in human rights rallies as well as in expert meetings on the design of rules on deep seabed mining or geostationary orbits. Debates amongst members of the Security Council in New York are framed by international law, as are the themes and demands of anti-globalisation activists in Porto Alegre. It is hard to think of *any* international meeting where international law would not appear as a key part of somebody's agenda, at least as a mode of

expression. Scores of conferences are held at any moment on questions such as the 'fight against impunity', 'human rights and terrorism' or 'trade and global governance'; in such circumstances international law is not limited to the concerns of academics or professionals. Everybody meets with it when reading a newspaper or listening to the news, thinking about the last war or the next, or engaging in a conversation in the local café about the rights and duties of one's country regarding the plight of migrant workers, for example.

The sense of international legal concepts and institutions depends on the context in which they are invoked, often in polemical juxtaposition to contrasting positions or views. The 'domestic jurisdiction' to which a state refers at some international institution is not the same as that which is debated at an academic conference or contested at a meeting of Greenpeace activists. To know its meaning, we should know what policy it is intended to support, or against whom or which kind of preference it is expected to operate. International legal concepts and institutions are in this sense intensely contextual. This is not to say that their meaning necessarily varies from day to day or from speaker to speaker. The language of the law structures and inhibits as well as enables. There are typical contexts and patterns of behaviour, cultural frames in which standard positions keep occurring and fixed understandings emerge. To know something about these contexts is a first step in coming to know international law.

One rather obvious context is that of diplomacy. This is where international law is expected to show its 'hard' nucleus. The rules, institutions and techniques of diplomacy have always been framed by international law: rules regarding the immunity of ambassadors are amongst the oldest ones in the field, and since the eighteenth century have shown considerable continuity. (The rules on diplomatic precedence adopted at the Congress of Vienna in 1815 were included, without material change, in the Vienna Convention on Diplomatic Relations of 1961.) Here law appears as a tool of statecraft, an instrument to organise cooperation across boundaries and through which states may channel their controversies into more peaceful avenues. The close historical linkage of the law of nations with the diplomacy of the (European) states-system is certainly responsible for much of what we know as today's international law: the system of territorial sovereignty, of treaties and bilateral and multilateral negotiations, the rightful conduct of inter-state politics in peace and war.

Even within diplomacy, however, there are disagreements about how to understand international law's intervention, as discussed by Gerry Simpson

in Chapter 1. It is sometimes imagined that international law is an 'autonomous system' of concepts and institutions that may be used to oppose and limit state power. But equally (or perhaps more) often it appears as a dependent variable, largely or entirely conditioned by the vicissitudes of diplomatic power and strategy. One way to highlight international law's significance is to point to the way its rules provide the frame – the procedures – through which diplomacy is to operate, and is to some extent domesticated. In this sense, much about international law depends on state power. But the equation goes both ways: is not the 'state' itself a legal construction, a product of legal rules and procedures? Debates on the emergence and dissolution of states illustrate this dialectic. In principle, only *de facto* powerful entities are accepted as formal states. But not all power (for example, illegal power – the case of Southern Rhodesia) leads to statehood. And sometimes relatively powerless entities may be qualified as states if they appear to fulfil the formal criteria (the cases of Tuvalu and Kosovo, for example).

Stressing law's role in diplomacy has often been challenged as excessively 'idealist'. However, key aspects of the international system and state behaviour operate by reference to legal rules and institutions and law itself is empowering to the extent that it provides a garb of legitimacy over practices, such as the methodical killing of human individuals on the battlefield, that might otherwise seem morally impermissible. Here there is reason to avoid sweeping generalisation. Diplomatic cultures are distinct, and different states give differing emphasis to law in their activities. Hence Simpson is right to point to the way international law has been sometimes seen as virtuous, sometimes marginal, sometimes as only a passive reflection of state power and will, at other times a morally inspired antidote to them.

Instead of fixing the relationship between diplomacy and law in some general frame – especially a 'realist' or 'idealist' frame – Simpson finds it more useful to provide a historical sketch of their interaction. In such an examination we see international law emerge, together with European statehood, from the collapse of empire and then engage in a flux between more or less imperial or anti-imperial positions, aligning itself at times closely with the hegemon, at other times taking on an anti-hegemonic appearance. Like any cultural phenomenon, international law has had its ups and downs. While the most recent 'up' was constituted of the period of busy institutional construction during 1989–2001 (including notably the

creation of the World Trade Organisation in 1994, and of the International Criminal Court in 1998), more recent times have perhaps shown the limits to which law can be understood as crucial to diplomacy. It is part of statecraft – but it cannot be reduced to statecraft and is often used in order to criticise what states do, notably in the 'war against terror' that followed the attack on the World Trade Center on 11 September 2001.

But diplomacy is only one context in which international law appears. Martti Koskenniemi's contribution (Chapter 2) examines its role in the world of ideas, in the context of imagining alternative futures, in sometimes theological or morally oriented debates from early modernity to the present. Alongside statesmen and diplomats, international law is also spoken by political thinkers and philosophers who often see in international law a privileged platform over which to debate weighty issues of global politics or morality. The conglomerate of projects and intuitions labelled 'cosmopolitanism' frequently takes a legalistic air. And sometimes ideas of a world legal order migrate from political utopias to the conference-table. Human rights certainly navigate between the world of normative ideas and their formal articulation in legal instruments, inhabiting a gray zone between philosophy and legal practice in a way that leaves many argumentative avenues open for enterprising lawyers and activists. As with the context of diplomacy, however, it seems impossible to pin down a distinct, definable role that international law plays here. Koskenniemi, too, has chosen a chronological approach to illuminate the appearance of international law in the intellectual contests of the successive periods of (Western) modernity.

A visitor in the contexts of diplomacy and philosophical and political ideas, international law's 'home' surely is the context of law. This is the genus of which international is a species – and it is not uncommon for experts on diplomacy or polities to neglect this. International lawyers are not only trained in specific techniques of international cooperation, but also, indeed first of all, as *lawyers*. If there is a legal 'mindset' then, for better or for worse, what makes international lawyers often incomprehensible for their colleagues is that they share it. But as Frédéric Mégret shows, 'home' itself has not always been terribly accommodating and the question whether international law really is 'law' continues to be posed by suspicious legal colleagues – and answered in a standard series of arguments, with little hope that this controversy can be settled in the foreseeable future (see Chapter 3).

It is true that international law differs in many ways from other branches of law – and this has given rise to a long-standing debate about its 'special

character'. Clearly it is 'law' in some respects (for example, it has courts). Yet it appears less so in other respects (for example, because those courts do not have compulsory jurisdiction over states). Depending on which aspect emphasis is laid on and what attitude one takes towards those special features, one may be classified as either 'denier' or 'idealist', 'apologist' or 'reformist' or, indeed, 'critic', in Mégret's useful classification. The most conspicuous aspect of international law's speciality, however, may be its constant silent transformation, not as a result of legislative activities of formal law-making organs (indeed there are few such organs), but in response to the needs of its 'consumers'. It is that fluidity – its 'dynamics' – that ultimately accounts for the inability of any of the four or five standard theoretical positions to grasp it wholly. International law is what we make of it and here the connotation of the 'we' has no pre-established limits. Surely, a consensus about what international law is, how it operates and for whom, may arise in each of its contexts – but that view may be different between those contexts and one source of richness of the discipline is that they operate relatively independently and are in no hierarchical relationship to each other.

International law and the state

The term 'international law' was invented by Jeremy Bentham in 1789 and established itself in the nineteenth century in preference to the older phrase 'the law of nations', itself a translation of the Latin '*jus gentium*' of Grotius, the French '*droit des gens*' of Vattel (see Janis 1984). None of these phrases expressly limited international law to a law between states. But over time, as the state system became established to the exclusion of other authorities (local and supranational), international law came increasingly focused on the state and on inter-state relations. And that is still a major preoccupation, despite developments towards greater inclusiveness in such fields as international human rights. Even there the state is an ever-present partner. Human rights at the international level are articulated as rights against the state; they define what the state may or may not do, as much as what individuals may claim or expect. Part II of this volume is accordingly focused on some major features of international law as concerns the state.

There is an initial question of identifying the components of the system, states, governments and peoples – a task undertaken by Karen Knop

(see Chapter 4). In modern international law, the most present of the three, the active ingredient so to speak, is the government. Senior government officials (head of state, head of government, minister of foreign affairs and some others) have inbuilt authority to represent the state, with correlative immunities while doing so (see *Arrest Warrant*, ICJ Reports 2002, 22–25). Such authority does not depend on any mandate from the people of the state: democractic legitimacy is so far a desideratum, not a requirement, and thus not a basis for claiming that transactions are beyond power (*ultra vires*). But the entity represented and thereby committed is not the government (which is not regarded as a legal entity in international law); it is the state. This so-called 'fictional theory' of the state is justified as a force for stability, an inter-generational transmission device (see Skinner 2010, 46). It is the source of the 'borrowing privilege' of which Thomas Pogge is so critical (see Chapter 17).

Knop duly notes that 'the state as territory–people–government is international law's main device for representing the world', but she stresses the diversity of representational mandates both within and beyond the state. Aspects of this include the way in which the principle of self-determination has been selectively applied in practice, while continuing to act as a driving force underlying claims for identity and representation within the state (e.g., indigenous peoples) and also, in aspiration and occasionally in reality, beyond it (e.g. Quebec, Kosovo). Similarly with the case of democratic rights: these are rather weakly reflected in current international law – as rights against the state – but they are not entirely absent. In particular, in post-conflict situations, international law has mandated particular, sometimes intricate and experimental, forms of representative government, reflecting the presence of different national, ethnic, religious or cultural groups.

Beyond the state, there is increased interest in other forms of representation, for example in the idea of 'international civil society' (see Keane 2005) and in the practice of international non-governmental organisations (NGOs) (see Lindblom 2005). But Knop detects a trend back to the state – '[t]he emphasis is no longer on actors and who has the right to participate, but on law and how it works or what it is, international law in particular'. If so, the state on which attention is refocused can be seen as more diverse, and in terms of its capacity for representation of groups and peoples, more resourceful than standard legal accounts allow.

Statehood once achieved, international law regards each state as sovereign, in the sense that it is presumed to have full authority to act both

internally and at the international level. In Chapter 5, James Crawford explores in more detail what this sovereignty consists in as a matter of international law. He stresses its formal character: the equality of states is a reflection of their sovereignty vis-à-vis each other but it is consistent with great inequality in fact. Post-1945 international law assumed the new task of a collective guarantee of sovereignty which, combined with the principle of self-determination led in the subsequent sixty-five years to a great increase in the number of states, with many new creations and the extinction of almost none. It is common in international relations theory to belittle this equal, formal sovereignty. International lawyers themselves are divided in their approach to sovereignty, accepting or contesting it, seeking to subvert or reinvent it. But seen as sovereignty under the law rather than above it, it can be defended as a flexible tool for protecting the autonomy of states, large and small, and for projecting them, rights and all, into the future. As such it remains a 'basic constitutional doctrine of the law of nations' (Brownlie 2008, 289).

Continuing in this formal mode, Simma and Müller give an account of the jurisdiction of states, their scope of legal authority (see Chapter 6). In the first instance it is for each state to decide which transactions or activities it will regulate and on what basis. States are both territorial governmental entities and aggregates of individuals owing allegiance (if nationals, permanently; if residents, then for the time being). International law seeks to reduce the scope for conflicts of jurisdiction, and where these cannot be eliminated, to moderate their effects. For example, states may tax persons on grounds of residence in their territory (all income earned by persons considered as resident for tax purposes, irrespective of nationality) or on grounds of nationality (all income earned by nationals wherever resident), or some combination of these criteria. Both the territoriality and the nationality principle being valid grounds of jurisdiction, international law does not choose between them, so taxpayers face double or even multiple taxation which international law merely mitigates (a) by the negative principle that no state enforces the fiscal or penal laws of another, and (b) by a network of treaties reducing the incidence of double taxation.

Like some other traditional areas of international law, the law of jurisdiction is dominantly an inter-state matter – individuals and corporations being treated as 'objects' rather than right-holders. For example, the human rights treaties articulate the right not to be tried twice for the same offence

(*ne bis in idem* or double jeopardy), but this is without prejudice to the jurisdiction of each state over crimes defined by its own legislation: article 14(7) of the International Covenant on Civil and Political Rights (ICCPR, 1966) refers to 'the law and penal procedure *of each country*'. Even in fields where the development of human rights has impinged on jurisdiction – e.g. the conferral of nationality – it has done so only to a limited extent; there is a strong international public policy against statelessness, but the relevant treaties do not exhaustively specify which state's nationality shall be conferred in any given circumstance, so that statelessness remains an open possibility; indeed, it is still quite common.

Beyond the jurisdictional principles of territoriality and nationality, there are other accepted grounds for regulation and enforcement, as well as a number of more controversial candidates. Amongst the former, Simma and Müller identify flag state jurisdiction (for ships, aircraft and spacecraft) and jurisdiction based on the protective principle; amongst the latter, the principle of universal jurisdiction, traditionally exercised over piracy on the high seas but also over certain crimes (see the Rome Statute for an International Criminal Court 1998, one of the consequences of which – in conjunction with the principle of complementarity – has been to expand the scope of *national* criminal jurisdiction over specified crimes). And this lesson can be generalised: in both the civil and criminal sphere the law of jurisdiction gives no priority to exclusive jurisdiction (except in relation to enforcement) and is increasingly the subject of cooperative international arrangements from which individuals may find it more difficult to escape.

A further asserted monopoly on which the modern territorial state is founded is the monopoly of legitimate force, including ultimately resort to war. Here international law's role is commonly portrayed as one of restraint and limitation, but as David Kennedy shows (see Chapter 7) the matter is by no means so simple. In its origins international law was intimately associated with late medieval just war theory, and despite appearances the linkage between law and war has never been broken. Thus, according to Kennedy, in place of an unsatisfactory 'image of a law outside war (and a sovereign power normally "at peace")', the reality is 'an image of sovereign power and legal determination themselves bound up with war, having their origin in war and contributing . . . to the ongoing, if often silent, wars which are embedded in the structure of international life'. Far from being set over and against war as its antithesis, war and law are seen as opposite sides of the same coin; law and legal claims not merely