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The nature of international law

1.1 Introduction

What would the world be like without international law? We cannot really answer this question but we do know that the world relies on this body of law to deal with important and difficult issues that require cooperation among the States or nations of the world. Such problems include terrorism, the increasing spread of HIV/AIDS, countries expanding their nuclear arsenals, reducing the flow of refugees and asylum seekers into neighbouring countries, and mitigating the potential of climate change. International law is commonly defined as the rules governing the legal relationship between States. International law provides a framework for understanding what rights and duties States have in relation to each other, and other international actors such as the United Nations (UN). This definition emphasises the role of States in establishing the legal relationships needed for solving many of their cooperation problems internationally. It creates a predominant role for States in establishing a normative way of dealing with issues of global significance. The ‘law’ in international law is traditionally a reference to rules or principles. These rules are seen as obligatory by virtue of the fact that States consent to being bound by them. It is normal to look for these rules in agreements which States sign with each other (ie treaties) or by examining the customary practices of States in relation to particular issues (ie customary international law).

The increasing impact and role of international law is also part of the phenomena of globalisation. In many areas of life, the actions or omissions of individuals or organisations may have impacts on someone outside of their country. The simple act of buying a new pair of sports shoes in a local shopping centre may contribute to the profits of a foreign multinational corporation and impact upon the lives of factory workers employed in a foreign manufacturing plant. These increasingly entwined local, national and international relationships are the basis for developing international relations and politics because countries or their governments have to

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cooperate to deal with transnational issues. This in turn shapes or stimulates how international law is received and created by States, which are its most important subjects.

While there is consensus as to the core definitional elements of international law, scholars have described international law in different ways. A definition or a description of international law often includes many assumptions about the nature of law and its purpose in international society. Later in this chapter some of these views are discussed in more detail. However, consider the description of international law by Rosalyn Higgins, a former President of the International Court of Justice (ICJ).¹ Higgins emphasises the purpose for having a system of international law rather than what it does functionally:

International law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct – that is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price. Normative systems make possible that degree of order if society is to maximize the common good – and, indeed, even to avoid chaos in the web of bilateral and multilateral relations that that society embraces. Without law at the domestic level, cars cannot safely travel on the roads, purchases cannot be made, personal safety cannot be secured. Without international law, safe aviation could not be agreed, resources could not be allocated, people could not safely choose to dwell in foreign lands. Two points are immediately apparent. The first is that this is humdrum stuff. The role of law is to provide an operational system for securing values that we all desire – security, freedom, the provision of sufficient materials goods. It is not, as is commonly supposed, only about resolving disputes. If a legal system works well, then disputes are in large part avoided. The identification of required norms of behaviour, and techniques to secure routine compliance with them, play an important part. An efficacious legal system can also contain competing interests, allowing those who hold them not to insist upon immediate and unqualified vindication. Of course, sometimes dispute resolution will be needed; or even norms to limit the parameters of conduct when normal friendly relations have broken down and dispute resolution failed. But these last elements are only a small part of the overall picture. The second point is that, in these essentials, international law is no different from domestic law. It is not, as some suppose, an arcane and obscure body of rules whose origin and purpose are shrouded in mystery. But, if the social purpose of international law and domestic law is broadly similar, there are important differences arising from the fact that domestic law operates in a vertical legal order, and international law in a horizontal legal order. Consent and sovereignty are constraining factors against which the prescribing, invoking, and applying of international law norms must operate.²

This chapter will introduce the idea of international law as a legal system and not just as a normative system in the way that Higgins suggests. It will consider various ideas that help us to appreciate its importance in purposefully addressing global and transnational issues. It will also critique assumptions and views which see international law as having a singular focus and relevance for a plural and multicultural world.

1.2 Nature and significance of international law

Whether or not the international community has created a system of law that is mature and lasting is an important consideration and goes to the heart of establishing its

¹ President of the International Court of Justice (2006–09); Justice of the Court (1995–2009).

² Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1999, p 1.

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significance for the global community. To help illustrate the nature and significance of international law two different discussions are extracted below from prominent writers in this field. The work of Louis Henkin is a fixture in many textbooks on this subject and is often cited for his defence of the relevance of international law in global politics. Given that he was writing in 1979 it is both interesting and important to compare his work with that of Thomas Franck who, as another modern scholar, has contributed significantly to a defence of international law as a discipline. Franck, however, writing in 1995, has put forward a much more dynamic defence of the discipline.

Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn, Columbia University Press, New York, 1979 (footnotes omitted)

[320] The law works. Although there is no one to determine and adjudge the law with authoritative infallibility, there is wide agreement on the content and meaning of law and agreements, even in a world variously divided. Although there is little that is comparable to executive law enforcement in a domestic society, there are effective forces, internal and external, to induce general compliance. Nations recognize that the observance of law is in their interest and that every violation may also bring particular undesirable consequences. It is the unusual case in which policy-makers believe that the advantages of violation outweigh those of law observance, or where domestic pressures compel a government to violation even against the perceived national interest. The important violations are of political law and agreements, where basic interests of national security or independence are involved, engaging passions, prides, and prejudices, and where rational calculation of cost and advantage is less likely to occur and difficult to make. Yet, as we have seen, the most important principle of law today is commonly observed: nations have not been going to war, unilateral uses of force have been only occasional, brief, limited. Even the uncertain law against intervention, seriously breached in several instances, has undoubtedly deterred intervention in many other instances. Where political law has not deterred action it has often postponed or limited action or determined a choice among alternative actions.

[321] None of this argument is intended to suggest that attention to law is the paramount or determinant motivation in national behaviour, or even that it is always a dominant factor. A norm or obligation brings no guarantee of performance; it does add an important increment of interest in performing the obligation. Because of the requirements of law or of some prior agreement, nations modify their conduct in significant respects and in substantial degrees. It takes an extraordinary and substantially more important interest to persuade a nation to violate its obligations. Foreign policy, we know, is far from free; even the most powerful nations have learned that there are forces within their society and, even more, in the society of nations that limit their freedom of choice. When a contemplated action would violate international law or a treaty, there is additional, substantial limitation on the freedom to act. The varieties of law that permeate international relations maintain international society. They shape the behaviour of nations. They achieve substantial order, and even welfare and justice, in significant measure. One may protest, then, that international law is misunderstood and grossly underestimated, that it is a vital force in international affairs and a

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dominant influence in national policy. But one must not protest too much. The fact is that international law and international society are still 'underdeveloped.' Some of its deficiencies the society shares with many domestic societies. It remains tense with political-ideological conflict and awesome arms races, destabilized by increasing numbers of unstable nations, disturbed by the impatient striving of the unfortunate many for more goods, power, influence. International society is still far from dedicated to the general welfare, to elevation of the living standards of all, to reduction of the disparities in well-being among nations. International law in some respects, fares less well than does the law in developed domestic societies. Large areas of international life remain effectively unregulated. Governments do not yet find violations of law unthinkable, nor are they yet deeply persuaded that law and law observance are in their ultimate interest; there is yet no confident reliance by others that a nation will observe important law...

[322] A lawyer might answer that for inadequacies in justice and welfare, in stability and order, the fault is not the law but in society. Law does not achieve these goals in the best of societies unless its members desire them and are prepared to pay their cost. But if international law can blame its inadequacies on the society, still it cannot deny them.

Thomas Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1995 (footnotes omitted)

[4] In the concluding years of the second millennium, no single legal scholar could any longer expect to restate the entire contents of the international legal system. International law has entered the stage of the practitioner-specialist. Specialization is a tribute which the profession pays to the maturity of the legal system. In national legal systems, this tribute is taken for granted. The system of even a small nation is bound to be far too complex to allow mastery by generalists...

[5] However, it is only recently that international law, too, has attained the status of a mature, complex system with rules and processes every bit as variegated as those of a nation. One example of this mature complexity is provided by the recently completed Third US Restatement of Foreign Relations Law (which, like the Codex, also involved many experts with various specializations). The time when any one scholar could give a definitive overview of the whole of Public International Law is past. Nowadays, scholars and practitioners choose to specialize in international contracts for the sale of goods or in the law of treaties; international tort or criminal law; international resource law or the law of human rights; aviation or law of the seas; communications law or space law; sovereign or diplomatic immunities; conflict of jurisdictions, or of intergenerational claims; unfair business practices of unfair expropriations; international aspects of antitrust laws or of international tax laws; the law of international organizations or of international waterways. This specialization reflects the fact that the law of the international community has, through maturity, acquired complexity. International law has matured into a complete legal system covering all aspects of relations among states, and also, more recently, aspects of relations between states and their federated units, between states and persons, between persons of several states, between states and multinational corporations, and between international organizations and

their state members . . . Nor is that all. A new international law is developing which governs relations between an international organization and its employees, and between international organizations themselves. This list of relations governed by international law is far from complete; it merely illustrates the breadth of the terrain and the pace of its transformation. Only a few decades ago, international law applied exclusively to states. Today, it is an intricate network of laws governing a myriad of rights and duties that stretch across and [6] beyond national boundaries, piercing the statist veil even while it sometimes pretends that nothing has changed.

Notes

1. Henkin and Franck compare the nature and significance of international law from very different standpoints. For Franck the significance of international law in the modern era is its scope and potential reach. This is partly because he takes for granted the fact that debates about international law have clearly moved on from the kind of discussion put forward by Henkin. Whereas Henkin questions the reach of international law, Franck makes it central to his argument about its maturity. No doubt the perspectives that they bring to bear upon international law are also shaped by their development as international lawyers. Henkin's engagement as a young lawyer with the newly established UN and its focus upon developing respect for human rights was no doubt influential. Franck is a scholar of a later era, having studied law almost 20 years later at a time when the UN was already in existence and its institutions coming under increasing strain but when international law was rapidly developing and new multilateral treaties were being concluded during the 1960s.
2. Franck also begins to highlight the significance of international law not just for States but for others who act or engage transnationally. This extends both the definition of international law as including actors other than States but also identifies the direct significance of this body of law for a greater portion of humanity.
3. Contemporary scholars of international law have been critical of the narrow focus of the discipline and argued for a more expansive, inclusive international law. This is a theme which is developed further below; however, consider the views of Hilary Charlesworth, a leading Australian international law scholar, who critiqued the attention the international law community gave to the 1999 Kosovo intervention by NATO as being reflective of how international lawyers tend to be driven by their response and considerations to international crises.

One way forward is to refocus international law on issues of structural justice that underpin everyday life. What might an international law of everyday life look like? At the same time that the much-analysed events in Kosovo were taking place, 1.2 billion people lived on less than a dollar a day. We know that 2.4 billion people in the developing world do not have access to basic sanitation, and that half of this number are chronically malnourished; we know that the developed world holds one quarter of the world's population, but holds four-fifths of the world's income; we know that military spending worldwide is over \$1 billion a day and that alternative uses of tiny fractions could generate real change in education, health care and nutrition; we know that almost 34 million people worldwide live with HIV/AIDS; we know that violence against women is at epidemic levels the world over. Why are these phenomena not widely studied by international lawyers? Why are they at the margins of the

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international law world? An international law of everyday life would require a methodology to consider the perspective of non-elite groups.³

4. In addition to influencing inter-State behaviour, international law is also significant in terms of its effectiveness to change domestic conditions within a State and therefore operate on an intra-State basis. The ability of international law to influence domestic conditions varies between States.⁴ Individual constitutional arrangements can, for example, have significant impact. It also varies among writers and scholars analysing this issue. Michael Kirby, a former Justice of the High Court of Australia,⁵ identified the significance of international law for his work as a judge in the following terms:

But no sitting of the High Court of Australia now passes without some relevant international legal principle being invoked as an aspect of a domestic legal problem. Many cases come before the Court concerning the *Refugees Convention* which, in Australia, has been incorporated into municipal law in respect of the definition of 'refugees'. Beyond this, important questions are regularly presented to the courts concerning extradition law, the *Convention on the Civil Aspects of International Child Abduction*, the international intellectual property protection regimes, various conventions of the International Labor Organisation to which Australia is a party, the *Hague Rules* and the *Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, and the *Closer Economic Relations Treaty* between Australia and New Zealand.⁶

5. Much debate rages as to the effectiveness of international law. This is often the case where an egregious breach or failure of international law has occurred such as mass atrocity crimes, and the outbreak of armed conflicts between countries. The significance of international law has to be evaluated in the context of what it is seeking to achieve in the world. For instance, one could assess international law in terms of whether it promotes the general welfare of everyone in the world or maintains order by establishing a stable regime for ensuring international peace and security. Alternatively one could simply assess its relevance for encouraging productive interactions among the key actors in the world who are ultimately interested in the needs and interests of their domestic constituency. In this situation, international law is viewed as merely a tool which reduces transaction costs for States who would have to otherwise establish bilateral political relationships with many different States.

1.2.1 International law, humanity and the rule of law

The speech below, delivered by Kofi Annan,⁷ a former UN Secretary-General, is a good introduction to another way of assessing the role and significance of law in the affairs of States. Annan engages with the idea of using international law to protect the general welfare of humanity and its peace and security in particular. This suggests that international law is more than just a system of rules designed to maintain order

³ Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* pp 377, 391.

⁴ See further discussion of the relationship between international law and municipal law in Chapter 4.

⁵ Justice of the High Court of Australia (1996–2009).

⁶ Michael Kirby, 'International Law – Down in the Engineroom', in Australian and New Zealand Society of International Law and American Society of International Law, *International Legal Challenges for the Twenty-First Century*, Centre for International and Public Law, Faculty of Law, Australian National University, Canberra, 2000, p 11.

⁷ Secretary-General of the United Nations (1997–2006); Nobel Peace Prize (2001).

or to encourage cooperation. His emphasis on building an international community that values the rule of law is an important theme considered by those who adopt a normative view of what international law should achieve.

**Kofi Annan, 'Secretary-General's Address to the General Assembly',
21 September 2004⁸**

The vision of 'a government of laws and not of men' is almost as old as civilisation itself. In a hallway not far from this podium is a replica of the code of laws promulgated by Hammurabi more than three thousand years ago, in the land we now call Iraq.

Much of Hammurabi's code now seems impossibly harsh. But etched into its tablets are principles of justice that have been recognised, if seldom fully implemented, by almost every human society since his time:

Legal protection for the poor.

Restraints on the strong, so that they cannot oppress the weak.

Laws publicly enacted, and known to all.

That code was a landmark in mankind's struggle to build an order where, instead of might making right, right would make might. Many nations represented in this chamber can proudly point to founding documents of their own that embody that simple concept. And this Organization – your United Nations – is founded on the same simple principle.

Yet today the rule of law is at risk around the world. Again and again, we see fundamental laws shamelessly disregarded – those that ordain respect for innocent life, for civilians, for the vulnerable – especially children.

To mention only a few flagrant and topical examples:

In Iraq, we see civilians massacred in cold blood, while relief workers, journalists and other non-combatants are taken hostage and put to death in the most barbarous fashion. At the same time, we have seen Iraqi prisoners disgracefully abused.

In Darfur, we see whole populations displaced, and their homes destroyed, while rape is used as a deliberate strategy.

In northern Uganda, we have seen children mutilated, and forced to take part in acts of unspeakable cruelty.

In Beslan, we have seen children taken hostage and brutally massacred.

In Israel we see civilians, including children, deliberately targeted by Palestinian suicide bombers. And in Palestine we see homes destroyed, lands seized, and needless civilian casualties caused by Israel's excessive use of force.

And all over the world we see people being prepared for further such acts, through hate propaganda directed at Jews, Muslims, against anyone who can be identified as different from one's own group.

⁸ Available at <www.un.org/apps/sg/sgstats.asp?nid=1088>.

Excellencies,

No cause, no grievance, however legitimate in itself, can begin to justify such acts. They put all of us to shame. Their prevalence reflects our collective failure to uphold the rule of law, and instil respect for it in our fellow men and women. We all have a duty to do whatever we can to restore that respect.

To do so, we must start from the principle that no one is above the law, and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad; and every nation that insists on it abroad must enforce it at home.

Yes, the rule of law starts at home. But in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse, and the powerful manipulate laws to retain power and accumulate wealth. At times even the necessary fight against terrorism is allowed to encroach unnecessarily on civil liberties.

At the international level, all states – strong and weak, big and small – need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. From trade to terrorism, from the law of the sea to weapons of mass destruction, States have created an impressive body of norms and laws. This is one of our Organization’s proudest achievements.

And yet this framework is riddled with gaps and weaknesses. Too often it is applied selectively, and enforced arbitrarily. It lacks the teeth that turn a body of laws into an effective legal system.

Where enforcement capacity does exist, as in the Security Council, many feel it is not always used fairly or effectively. Where the rule of law is most earnestly invoked, as in the Commission on Human Rights, those invoking it do not always practise what they preach.

Those who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it.

Just as, within a country, respect for the law depends on the sense that all have a say in making and implementing it, so it is in our global community. No nation must feel excluded. All must feel that international law belongs to them, and protects their legitimate interests.

Rule of law as a mere concept is not enough. Laws must be put into practice, and permeate the fabric of our lives.

It is by strengthening and implementing disarmament treaties, including their verification provisions, that we can best defend ourselves against the proliferation – and potential use – of weapons of mass destruction.

It is by applying the law that we can deny financial resources and safe havens to terrorists – an essential element in any strategy for defeating terrorism.

It is by reintroducing the rule of law, and confidence in its impartial application, that we can hope to resuscitate societies shattered by conflict.

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It is the law, including Security Council resolutions, which offers the best foundation for resolving prolonged conflicts – in the Middle East, in Iraq, and around the world.

And it is by rigorously upholding international law that we can, and must, fulfil our responsibility to protect innocent civilians from genocide, crimes against humanity and war crimes. As I warned this Assembly five years ago, history will judge us very harshly if we let ourselves be deflected from this task, or think we are excused from it, by invocations of national sovereignty.

2005 World Summit Outcome, UN General Assembly Resolution A/RES/60/1, 16 September 2005

The General Assembly

Adopts the following 2005 World Summit Outcome:

2005 World Summit Outcome

I. Values and principles . . .

11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger . . .

IV. Human rights and the rule of law

119. We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.

120. We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question . . .

Rule of law

134. Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:

- (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;
- (b) Support the annual treaty event;
- (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;

- (d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;
- (e) Support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building;
- (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.

Notes

- 1. Whether or not international law as a system of law is capable of establishing the rule of law is a difficult question to answer. Often, scholars and diplomats will vary in their understanding of what the rule of law might mean as a concept. This is a different argument to suggesting that rules or principles are indeterminate. Additionally, as will be seen below, the concept of the rule of law is also subjected to a variety of critical perspectives about whether it achieves a just objective for everyone or just some people. This does not mean that international law in itself is not effective or significant. It simply points to the fact that the concept of the rule of law can be used in different ways by groups in the community of States to justify particular approaches to international law and politics. However, as seen in Annan's speech to the General Assembly, it does present the global community with the conceptual language to discuss the role that law must play within society.
- 2. The 2005 World Summit Outcome document was adopted only two years after a significant split within the UN Security Council in 2003 over the use of force against Iraq and ongoing debates as to whether those States involved in military operations in Iraq, including Australia, had acted contrary to international law.⁹ The strong statement of support by the General Assembly in the World Summit Outcome document for the rule of law was therefore not only a symbolic statement, but one which had political significance. The UN has done much to promote the rule of law since its inception. Not only is the role of international law reflected in the *Charter of the United Nations (UN Charter)*,¹⁰ through, for example, the existence of the ICJ as a judicial organ capable of peacefully resolving international disputes, but also through the actions of the UN in promoting the development of new international law on a multitude of topics. However, in addition to the UN promoting the rule of law should the UN also respect the rule of law, including international law? This raises issues as to the capacity of the UN to be subject to international law.¹¹
- 3. One area where the UN has had a clear capacity to impact upon the rule of law has been through its ability to codify international law based upon customary international

⁹ See further discussion on the use of force in 2003 in Iraq in Chapter 12 at 12.3.2.

¹⁰ [1945] ATS 1.

¹¹ See further Chapter 5 at 5.4.