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THE NATURE OF INTERNATIONAL LAW

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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. International law helps develop our aspirations for the international community and facilitates problem solving around such issues as terrorism, the increasing spread of diseases, and the need to reduce carbon emissions and mitigate against the effects of climate change. It contributes to creating order in the world and also to the deployment of political ambitions, which in turn can sometimes create additional problems for the international community, such as States claiming new territory or resources that are disputed. Importantly, it also enables a world without a central government to generate solutions for emerging and complex issues and problems, such as cyber-security and warfare.

Not all international issues and problems are, however, easily identifiable as being within the purview of international law. An example of a complex international issue is the rise of globally significant cyber-attacks that do not appear to be State-sponsored or have State institutions as their main targets. However, given the significance of such attacks to the international community, many have assumed that international law and its institutions would have a central role in dealing with them. International law and its institutions, however, have limited powers and State institutions usually have to coordinate enforcement activities against foreign hackers. Domestic problems or issues, on the other hand, sometimes raise significant international law issues despite appearing as relevant only to the State concerned. For example, increasing taxes in Australia on domestically consumed movies, rather than on the income of nationally registered companies, acts as an import tariff on corporations that do not have Australian operations. Whether Australia can impose taxes on domestic consumption of goods and services has to be assessed in terms of implications for its international trade obligations. International law can, therefore, address and deal with very specific local issues and problems.

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. 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 that States sign with each other (ie treaties) or by examining the customary practices of States in relation to particular issues (ie customary international law).

These are orthodox statements about the role and significance of international law for States. Multinational companies, non-governmental organisations, and wealthy individuals also exercise a great deal of global influence on a broad range of topics and issues. It is no longer entirely accurate to define international law as being concerned only with States. While there is consensus on 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. This chapter contains materials that introduce a variety of ways to think about the scope and

potential of international law, both in terms of its role in creating order and solving cooperation problems, but also in terms of its reach as a legal system that is designed to be globally relevant and effective.

1.2 Nature and significance of international law

Whether or not the international community has a lasting and mature system of law is an important topic for discussion. To help illustrate the nature and significance of international law two prominent writers in this field are extracted below. 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 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 . . .

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[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 or 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 studied law almost 20 years later at a time when the UN was already in existence and its institutions were 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 at the international level. 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 have argued for a more expansive, inclusive international law. This is a

theme that is developed further below; however, consider the views of Hilary Charlesworth, a leading Australian international law scholar, who critiqued the attention that 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 international law world? An international law of everyday life would require a methodology to consider the perspective of non-elite groups.¹

4. Robert French, Chief Justice of the High Court of Australia during 2008–16, has also remarked on how the real reach of international law is sometimes lost because of the focus upon human rights abuses and international criminal justice. He comments:

Public discussion in Australia about international law tends to focus upon treaties or conventions in such areas as human rights and crimes against humanity. Sometimes these debates play out in the context of local culture wars and skepticism shading into hostility towards international organisations such as the United Nations. But human rights instruments, while of vital importance, are only one part of an array of international treaties and conventions and of international customary international law which create the network of rules and obligations that we designate generically as international law. They affect a large range of State and individual activities, particularly in the area of trade and commerce. The multilateral conventions, particularly those affecting trade and commerce, seem to change relatively frequently with corresponding changes in domestic legislation giving effect to them.²

5. Much debate rages about 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 States. 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

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

2 Robert French, 'International Law and Australian Domestic Law', speech delivered to the Supreme Court of New South Wales Annual Conference, 21 August 2009, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf>.

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 that reduces transaction costs for States that otherwise would have to establish bilateral political relationships with many different States. We explore a little later the idea that international law does not always help achieve good things and its potential to harm communities needs also to be kept in mind.

1.2.1 The rule of ‘international’ law

Delivered in 2004 by Kofi Annan,³ a former UN Secretary-General, the speech extracted below was central to establishing the importance of the rule of law for the work of the UN in ‘resuscitating societies shattered by conflict’.⁴ In 2005 States adopted a resolution at the World Summit confirming the significance of the rule of law for international relations.⁵ A range of initiatives through the UN culminated in a 2012 high-level meeting on the rule of law that produced a very detailed statement on the importance and details of the rule of ‘international’ law.

KOFI ANNAN, ‘SECRETARY-GENERAL’S ADDRESS TO THE GENERAL ASSEMBLY’, 21 SEPTEMBER 2004⁶

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.

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

4 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616 (23 August 2004).

5 UN General Assembly Resolution A/RES/60/1 (16 September 2005).

6 Available at United Nations, ‘Secretary-General – Latest Statements’, <http://www.un.org/sg/statements/?nid=1088>.

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.

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.

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.

UN GENERAL ASSEMBLY, *DECLARATION OF THE HIGH-LEVEL MEETING OF THE GENERAL ASSEMBLY ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: RESOLUTION, A/RES/67/1 (30 NOVEMBER 2012)*

We, Heads of State and Government, and heads of delegation have gathered at United Nations Headquarters in New York on 24 September 2012 to reaffirm our commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development. We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.

1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.
2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their

actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.

3. We are determined to establish a just and lasting peace all over the world, in accordance with the purposes and principles of the Charter of the United Nations. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, to respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, and to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter.

4. We reaffirm the duty of all States to settle their international disputes by peaceful means, inter alia through negotiation, enquiry, good offices, mediation, conciliation, arbitration and judicial settlement, or other peaceful means of their own choice.

5. We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.

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 has been critiqued in terms of 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 referred to in the introduction 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.⁷ The strong statement of support by the General Assembly in the *World Summit Outcome* document for

7 See further discussion on the use of force in 2003 in Iraq in Chapter 13 at 13.3.