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Introduction

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Public international law represents the legal architecture of international affairs. Often this architecture is hidden behind world events, such as a prime minister's apology to another state, a foreign minister's assertion that the military acted proportionately, or claims by foreign investors that they have been treated unfairly by the states where they operate. Sometimes, however, the language of international law is in plain view, such as when individuals assert their human right to a fair trial, or when one state accuses the other of violating the laws governing international trade. Much of international affairs, including front-page news, can only be fully understood with a knowledge of public international law.

The treatment of the Rohingya in Myanmar, for example, is a matter of great international concern and media attention, in part because recent developments have given rise to serious violations of public international law, and have led to litigation before international courts. The Rohingya are an ethnic Muslim minority population in Myanmar, and have long faced discrimination and persecution in Myanmar, where the vast majority of the population is Buddhist. In 2016 and 2017, matters escalated dramatically when Myanmar security forces undertook 'clearance operations' against the Rohingya, purportedly in order to eliminate the terrorist threat posed by the Rohingya. The ensuing violence and destruction of villages resulted in approximately 10,000 deaths, and a massive flow of more than 700,000 Rohingya refugees, mostly to neighbouring Bangladesh. These events must be understood not only from the perspective of history and politics, for example, but also in legal terms, as public international law provides the framework necessary for capturing the egregiousness of these 'clearance operations', and for holding both the state and individual leaders legally responsible.

While the International Court of Justice (ICJ) is currently hearing a case that will require it to determine whether Myanmar bears legal responsibility for a genocide against the Rohingya, the International Criminal Court (ICC) is investigating whether crimes against humanity have taken place, for which individuals may bear criminal responsibility.¹ The severity of the conduct of the Myanmar security forces cannot be fully captured by domestic crimes, such as murder and arson, nor are domestic institutions in Myanmar likely to provide

¹ ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*; in November 2019, a Pre-Trial Chamber of the ICC authorized the prosecutor to investigate the situation in Bangladesh/Myanmar.

any real form of accountability. The terms ‘genocide’ and ‘crimes against humanity’ originate in public international law and date back to the Nuremberg trials in Germany following the Second World War. By labelling conduct as a genocide or a crime against humanity, other states and international prosecutors acknowledge the extent to which fundamental norms, common to all states, have been transgressed. While litigation before international courts is no panacea, it opens up possibilities for legal accountability, including the criminal punishment of individuals, which would otherwise likely be entirely out of reach.

The goal of this book is to enable a deeper understanding of international affairs and world events through a knowledge of public international law. This chapter begins by introducing a number of foundational concepts, which serve as the starting point in the field of public international law. Section 1 of this chapter begins with the notion that states are sovereign equals, which must consent to be bound by international law. This section also introduces the critical distinction that international law makes between states and ‘non-state actors’. Section 2 of this chapter discusses the inevitable comparison of public international law with domestic legal systems, and the significant limitations of this analogy as a means for understanding the field of public international law. Section 3 concludes by explaining this book’s overarching structure as well as the approach of this book to the introduction of public international law.

1 Basic Features of International Law

a Sovereignty

Public international law is premised, in part, on the idea that states are ‘sovereign equals’, meaning that one state may not exercise power over another state. This quite abstract concept goes back many centuries, to the days when monarchs were regarded as sovereign, meaning that they had supreme power, subject to the power of no one. As the state itself came to be seen as separate from the head of state, however, the sovereign status of states emerged as a foundational premise of public international law. Sovereign equality has never meant that states are equal to one another with respect to territorial size, political influence, economic strength, or military power. States are indeed not equal to one another in factual terms, just as individuals are not always equal to one another, factually speaking. Instead, sovereign equality means that states are equal to one another in a legal rather than a factual sense, just as individuals are equal to each other before the law. Broadly speaking, sovereign equality means that each state has, as a matter of principle, the inherent power to make its own decisions about how to order its affairs, with the result that one state may not force its will upon another.

Sovereign equality has important practical implications for public international law and the way that states are bound to interact with each other. First, sovereignty is, as a matter of principle, limited to the territory of the state, which means that each state has supreme authority within its own borders. A state’s sovereign powers are generally limited to its territory, which could be delimited by a land and/or a maritime border, depending on the

geographical circumstances. As a consequence of the inherently territorial character of sovereignty, one state may not send its police force into the territory of another state in order to arrest a suspect or to gather evidence, at least not without violating that state's sovereignty. Instead, states have to rely on international law for such matters.²

The idea that one state may not force another state to submit to its will has other important practical implications, especially with respect to the exercise of military force. The invasion or occupation by one state of the territory of another state is a violation of one of the most basic rules of public international law, the prohibition on the threat or use of force in international relations, as contained in the United Nations Charter.³ The United Nations (UN) as an organization is explicitly based on the principle of the sovereign equality of all of its members, which now include virtually all states in the world.⁴ All UN members must accordingly refrain from threatening or using force against the territorial independence or political integrity of another state. This rule represents a cornerstone of public international law, and states typically attempt to excuse violations of this rule by reference to a small number of exceptions, including the use of force in self-defence.

The principle of sovereign equality has other important practical implications, as states must respect not only each other's territorial integrity and political independence, but also each other's political and economic systems. Within certain bounds, which are now established by international law, in particular human rights law, each state may decide for itself whether or not to embrace a representative democracy or to pursue an economic system based on capitalism, socialism, or communism.⁵ These are ideological and political decisions that each sovereign state has the authority to take for itself, without interference, for example, from neighbouring states or regional or global powers. Although capitalist and communist states have long been at odds with each other, as the history of the Cold War amply demonstrates, the fact remains that international law maintains the sovereign equality of all states, regardless of their political and economic orders.

In light of their status as sovereign equals, states must find ways of governing their internal affairs and conducting international relations when also respecting the sovereignty of other states.⁶ Public international law can thereby be seen, in very broad terms, as a legal framework that allows sovereign states not only to coexist with one another, but also to cooperate with one another.⁷ Friction and conflict inevitably arise between states with clashing interests and ideologies, but these states must nevertheless find ways to coexist

² In practice, states typically request the surrender of suspects and convicted persons on the basis of extradition treaties and they request evidence on the basis of mutual legal assistance treaties. See Chapter 6 on jurisdiction.

³ Charter of the UN (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(4). See Chapter 11 on the use of force.

⁴ UN Charter arts 2(1), 18(1). Such equality is reflected, for example, in the fact that each member of the UN has one vote in the General Assembly.

⁵ See, for example, the International Covenant on Civil and Political Rights, according to which every citizen has the right 'to take part in the conduct of public affairs, directly or through freely chosen representatives'. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 25(a).

⁶ See, *The Island of Palmas Case (or Miangas) (United States v The Netherlands)* (Award of the Tribunal) (1928) PCA Case 1925–01.

⁷ Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 60–3; Wolfgang Friedmann, 'General Course in Public International Law' (1969) 127 *Collected Courses of the Hague Academy of International Law*.

with one another in the international community. In addition, certain global problems that cross borders, such as transnational crime and climate change, require states to cooperate with each other in order to find solutions.

Public international legal rules could, thereby be categorized as falling under the scope of either the international law of coexistence or the international law of cooperation, or both in some cases. The law on the use of force, for example, could be seen as constituting part of the international law of coexistence, as it requires states to respect each other's territorial integrity and political independence by refraining from the threat or use of force in their relations with each other. The international law of coexistence could also be seen as encompassing international legal rules that govern the extent of a state's power to enact and enforce domestic laws (the law of jurisdiction); the extent of a state's maritime zones and its rights within those zones (the law of the sea); the circumstances under which a state is responsible for a violation of an international legal rule (law of state responsibility); and the methods by which states can resolve disputes between them (international dispute settlement). For its part, the international law of cooperation could be seen as encompassing international legal rules that govern international organizations; foreign investment and international trade (international economic law); and the protection of the environment (international environmental law). The dividing line between the law of coexistence and the law of cooperation will not always be clear, however, and a given international agreement may serve both ends.⁸ Ultimately, this dichotomy may be most usefully employed not so much as a classification device, but as a tool for identifying and distinguishing the two main functions of public international law.

Membership in international organizations, such as the UN and the European Union (EU), allows states to cooperate with each other and also to structure their coexistence. In becoming members of international organizations, states voluntarily limit the exercise of their sovereign powers, such that they no longer have complete freedom to order their affairs however they so choose. In becoming members of the UN, for example, states agree to carry out the binding resolutions that the UN Security Council has the capacity to adopt. States voluntarily surrender parts of their sovereign decision-making authority to international organizations because membership in international organizations enables levels of coexistence and cooperation that would be unattainable otherwise.

In recent years, however, international organizations have experienced something of a backlash, which has entailed not only the United Kingdom's exit from the EU (Brexit), but also tension between African states and the ICC and between the United States and the World Trade Organization (WTO), in particular its Appellate Body.⁹ These episodes have all involved serious friction between international organizations and their member states, which may be experiencing a form of 'buyer's remorse'. Although states consent to being members of international organizations and to being bound by their decisions, they cannot fully anticipate what this will entail in the future, and how limiting the

⁸ Parts of the law of the sea, for example, may be regarded as forming part of the international law of cooperation, in particular the rules governing the exploitation of the deep sea area, which falls beyond the jurisdiction of all states (see Chapter 15).

⁹ See Chapter 8 on international organizations.

exercise of their sovereign authority may conflict with domestic politics years down the road. For the most part, however, states accept and abide by the obligations that they assume by virtue of becoming members of international organizations, as they have voluntarily consented to membership and all that comes with that status.

b **Consent**

In the famous *Lotus* case between France and Turkey, the Permanent Court of International Justice¹⁰ (PCIJ) explained in its 1927 judgment that:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.¹¹

The Court's reference in this passage to the 'free will' of states must be understood as a reference to the notion of consent, which is a foundational concept in the field of public international law. The term 'consent' in the context of public international law refers to the act of agreeing to be bound by an international legal rule or by the authority of another entity, such as an international organization. In the *Lotus* case, the Court explained that states must consent to be bound by conventions (i.e., treaties) or by unwritten customary rules, which the Court described as 'usages generally accepted as expressing principles of law'.¹² The distinction between the international law of coexistence and the international law of cooperation also underlies this passage, as the Court explained that states may be motivated to give such consent either for the purpose of achieving coexistence, or for the purpose of pursuing 'common aims' through cooperation.

By virtue of being sovereign entities with full powers, states have the authority or capacity to limit their exercise of some of those powers by consenting to be bound by international legal rules. By consenting to a treaty, for example, a state may agree to be bound by laws that require it to refrain from certain conduct (i.e., the use of force in international relations), or laws that require it to engage in certain conduct (i.e., the protection of the environment). States cannot be forced to abide by international legal rules to which they did not consent, as consent is a necessary condition in order for an international legal norm to come into existence. Because of their sovereign status, states must agree to submit themselves to international law, or to the authority of international organizations.

All of public international law is, therefore the product of state consent, to one degree or another, although the link between a state's consent, and its corresponding legal obligation is

¹⁰ The PCIJ is the predecessor institution to the ICJ, which is the principal judicial organ of the UN.

¹¹ *The Case of the S.S. Lotus (France v Turkey)* (Judgment) (1927) PCIJ Rep Series A No 10, para 44.

¹² See Chapter 2 on sources of international law.

admittedly tenuous in certain circumstances. As noted previously, this is true in the context of international organizations, where membership entails consent to submit to the authority of the organization, including future binding decisions reached by the organization, which may or may not enjoy unanimous support among all members. Consent can also be remote in the context of customary international law, which refers to unwritten international legal rules that emerge through the practice of states that is performed out of a sense of legal obligation.¹³ Customary international law evolves organically over time through state practice that may not be truly universal. The consent of some or many states to a given customary norm may ultimately be assumed, as states are deemed to have consented to a given norm through passive, silent acceptance of the emerging customary rule. Thus, while consent represents a foundational concept in the field of public international law, state consent may sometimes have a remote or passive character. State consent nevertheless remains explicit and relatively straightforward with respect to treaties, which represent the main source of international law. Where a state has consented to become a party to a treaty, the rules embodied in the treaty accordingly emanate from the state's own free will. Withdrawal from a treaty, which is in practice a relatively infrequent occurrence, is also subject to a state's free will.¹⁴

c States and Non-state Actors

This introductory chapter has, thus far, dealt mainly with states because only states enjoy sovereignty and, therefore the power to consent to international law. International law is inescapably state-centred because states are the only actors with the capacity to consent to the creation of the international legal rules that bind them. Non-state actors like individuals and multinational corporations do not possess sovereignty, and they do not consent to be bound by international law or otherwise participate directly in the creation of laws that bind states. From an international legal perspective, then, the world may be seen as consisting of two categories of actors: states, and non-state actors.¹⁵ The 'catch-all' category of non-state actors encompasses all entities that are not states, including individuals, companies, non-governmental organizations (NGOs), international organizations, as well as entities that would like to be states, but have not (yet) achieved this status. The term non-state actor, thus refers to a hugely diverse range of actors that are united only by virtue of the fact that they are not states.

While this dichotomy between states and non-state actors is perfectly logical from the perspective of international law, which privileges sovereign states, the reality of international affairs is often far less state-centred. Large multinational corporations, for example, sometimes outmatch small countries in both economic terms and with respect to their political influence. In addition, armed rebel groups may not be state organs, but they can participate in armed conflicts just as the regular armed forces of a state do. The role that

¹³ See Chapter 2 on sources of international law.

¹⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 54, 56.

¹⁵ For a discussion of this dichotomy from a human rights perspective, see Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005).

non-state actors play in international society is, therefore sometimes at odds with the basic structure of public international law, which mainly consists of a body of rules that are created by states, largely for the purpose of governing their own relations and conduct. To a much more limited extent, public international law governs the relationships between states and non-state actors, and in some instances between non-state actors.

International law therefore has a largely ‘horizontal’ character, in that it governs relations between states, which are all sovereign equals, and thus have the same status and exist on the same level, figuratively speaking. Under international trade law, for example, states have agreed not to create barriers to imports and exports of goods, through tariffs or quotas or other means.¹⁶ Although non-state actors, such as businesses, stand to benefit from the rules that states have created in order to ensure free trade, they generally enjoy no direct rights or obligations under international trade law. States have concluded trade agreements between themselves, and only states enjoy rights and obligations under these laws. The same is true of most areas of public international law: states have created rules that govern relations between them, and although non-state actors may be impacted by or benefit from these rules, they are not parties to these agreements.

Public international law is not, however, entirely horizontal in character. To a limited extent, international law does create rights and duties for certain non-state actors, in particular persons (both natural and legal persons), such that it can also be seen as having a ‘vertical’ dimension. The relationship between individuals and the state is, for example, governed by human rights law, under which states bear obligations and individuals enjoy rights. Although only states are parties to human rights treaties, these agreements create rights for individuals, who, in certain circumstances, can assert their rights before domestic courts and regional or international bodies. The same is true with respect to investors, who enjoy certain rights under international investment law, and in some situations can pursue their claims before international tribunals. Individuals can also bear obligations, as opposed to rights, under public international law, in particular under international humanitarian law, which regulates conduct during armed conflicts, and international criminal law, which prohibits certain conduct, such as war crimes, crimes against humanity, and genocide. Individuals can now be held criminally liable for international crimes before international criminal courts and tribunals. Public international law is thus best understood as a largely horizontal field of law, created by and for states, but with some important exceptions that involve vertical relationships between states and non-state actors.¹⁷

2 The Domestic Law Analogy

Lawyers are trained, in part, to think by analogy. Law students are taught, for example, to consider how one case compares with another one, and whether the legal outcomes are likely

¹⁶ General Agreement on Tariffs and Trade 1994 (as annexed to the WTO Agreement) (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187.

¹⁷ See Chapters 12 and 13 on international humanitarian law and international criminal law, respectively.

to be, or should be, the same or different. Seen from this perspective, the fact that students (and sometimes scholars) of international law tend to draw analogies between domestic and international law is therefore unsurprising. Given that many students follow a course on the subject of public international law during their law studies, which mainly focus on domestic law, this sort of analogizing is very much to be expected. To a certain extent, comparing domestic legal systems with public international law brings into relief some of the unique and fundamental features of international law, including the centrality of sovereign equality of states, who must consent to the law that governs their relations with each other. But the utility of the domestic law analogy has its limits, as it tends to give rise to unnuanced accounts of how international law functions, or does not function, as the case may be. Ultimately, it is best to strive for an appreciation of public international law on its own terms, as a legal system that is fundamentally distinct from that of domestic legal systems.

A number of fundamental structural differences separates domestic and international law. Whereas domestic legal systems tend to consist of distinct branches, such as the legislature, the executive, and the judiciary, the same cannot be said of public international law. There is no international legislative body that promulgates rules with which states are obliged to comply. While the UN General Assembly now includes representatives from nearly all states in the world, it can hardly be described as a legislative body, in part because it lacks the capacity to adopt binding decisions.¹⁸ Instead, law-making in the international legal system is highly decentralized. States conclude international agreements as they see fit and where they are able to come to a satisfactory agreement, and the practice of states can also give rise to unwritten customary rules. Because states are both the creators of international law, and the subjects of the law that they create, international law-making somewhat resembles legal relations between private parties within domestic legal systems, such as when individuals conclude private contracts. Domestic legislatures, in contrast, are centralized bodies that enact laws that regulate the relationship between the state and the people. The legislators are often democratically elected, and therefore, represent their constituencies. The international legal system, however, is not inherently democratic, as international law-making is not a representative process. States do not necessarily represent constituencies when they conclude treaties, for example, although domestic political resistance to or support for an international agreement may indeed influence the government's pursuit of such an agreement. The rules adopted by international organizations may, however, take on a democratic quality where they are adopted by a vote among members of the organization.

The international legal system also lacks a judicial or other body that has the capacity to enforce all rules of public international law, and with respect to all states. International courts and tribunals cannot be seen as the enforcers of public international law, nor do they exist for this purpose. Within the UN system, the Security Council is the political body with certain enforcement powers in the context of the maintenance of international peace and security. The ICJ in contrast, was designed for the purpose of settling disputes when states

¹⁸ UN Charter arts 11–13.

so desire, and it was not conceived with a view towards playing an explicit role in the enforcement of the law. There are, in fact, no central enforcement bodies that enjoy the authority to compel states to comply with international law in general, for the simple reason that states have declined to create such a system of law.

Although the ICJ is the ‘principal judicial organ’ of the UN, its jurisdictional competence is far more limited than this phrase might suggest.¹⁹ The ICJ only has the capacity to render binding judgments in inter-state cases when both states have explicitly consented to the Court’s jurisdiction over them. The need for state consent is a function of state sovereignty, and the fact that states cannot be forced to submit to the will of a judicial body. This means, in practice, that relatively few disputes are litigated before the ICJ, or before other international courts and tribunals, although a steady stream of cases – some of which are quite high profile – has been brought before the ICJ since the 1990s.²⁰ This picture remarkably differs from domestic legal systems, where persons do not have the capacity to decline to consent to the jurisdiction of a court, whether in the context of civil or criminal litigation. In addition, domestic courts benefit from the capacity of the state to enforce their decisions, whether through arrests or the seizure of property, for example, whereas no such parallels exist in the field of public international law.

When viewed from the perspective of domestic law, the absence of compulsory enforcement mechanisms in the field of public international law begs the question: do states comply with international law, and if so, why? Do states refrain from conduct that international law prohibits, and do they engage in the conduct that international law requires? To assume that compliance is low on account of the absence of compulsory enforcement mechanisms would be to miss all the nuanced reasons why states do indeed comply with international law much of the time, but for reasons other than the prospect of a legal sanction for non-compliance.²¹ In addition to the sheer force of a given legal commitment, ethics, politics, economics, and reputational concerns can all play roles in bringing about compliance. But to insist that compliance with international law is always exemplary would, of course, paint an overly rosy picture. In the context of governmental decision-making concerning international affairs, for example, public international law provides the legal architecture and helps to guide assessments, but other factors sometimes weigh in favour of outcomes that are ultimately non-compliant, or very belatedly compliant. Moreover, states may not always appreciate the long-term consequences of non-compliance with international law. If approached from the perspective of domestic law, such issues concerning the enforcement of and compliance with international law can seem to bring the whole system of public international law into question. International law is best approached and understood on its own terms, with an openness to the different levers and tools that bring about compliance in this particular context.

¹⁹ UN Charter art 92.

²⁰ See, for example, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43; *The Gambia v Myanmar* (n 1).

²¹ Louis Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979) 47: ‘[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.

3 The Approach and Structure of This Book

This book is composed of two main parts: the first part covers the foundations of public international law (Chapters 2–9), while the second part introduces a number of branches of this field of law. The chapters covering foundational subjects deal with the building blocks of this field, beginning with the sources of international law (Chapter 2) and subjects, statehood, and self-determination (Chapter 3). These two chapters explain what international law is, what qualifies as a state, and how new states emerge. The foundational part of this book also covers the law of international obligations, namely the bodies of law that govern treaties (Chapter 4) and state responsibility (Chapter 5). These are the rules that govern the creation and operation of treaties, which are the primary source of international law, and the rules that allow us to determine when a state has violated international law and what the legal consequences of violations are. Jurisdiction and immunities (Chapters 6 and 7) are also foundational subjects, as they govern the extent of a state's sovereign powers, and the circumstances in which the exercise of those powers is barred for reasons relating to sovereign equality and the furtherance of international relations. The last two foundational topics are international organizations (Chapter 8) and international dispute settlement (Chapter 9). Because of the role that international organizations now play in facilitating coexistence as well as cooperation, an introduction to the law of international organizations is essential for an understanding of the field of public international law. Finally, the settlement of international disputes represents another cross-cutting subject, as all international disputes must be settled through recourse to peaceful means of dispute settlement, with litigation before international courts and tribunals representing just one of these means.

The second part of the book covers what the authors of this book consider to be the most significant sub-fields or branches of public international law, at least for the purposes of an introduction to the field. Many of these branches developed into discrete and robust sub-fields only after the Second World War, typically through the conclusion of treaties. It begins with human rights law (Chapter 10) and then covers bodies of law that cover the prohibition on the use of force (Chapter 11), international humanitarian law (also known as the law of armed conflict), which governs the conduct of hostilities during times of armed conflict (Chapter 12), and international criminal law, which provides for individual criminal responsibility (Chapter 13). These four chapters can be seen as related to each other as armed conflicts represent one of the greatest threats to the enjoyment of human rights, and also tends to result in calls for international criminal justice. International human rights law, however, covers many features of the relationship between a state and individuals, and thus has a scope of application extending well beyond times of armed conflict. The last three chapters of this book cover the sub-fields of international economic law (Chapter 14), the law of the sea (Chapter 15), and international environmental law (Chapter 16). These three bodies of law may also be seen as related to each other insofar as they all relate to questions of sustainable development, namely how economic development, including the exploitation of marine resources, can be balanced with the protection of the environment.