Introduction

The Problématique

There is a widely shared assumption that law is primarily characterised by individualism.[1] International law is no different. Much emphasis has been placed on the role that self-interest and reciprocity have in the formation and ultimate function of international legal rules. Rarely has attention been given to the presence of altruism in legal systems, let alone the international legal system. However, altruistic legal relationships between states and individuals in other countries or future generations are apparent in international law. This observation about the nature of some legal relationships is the point of departure for the present book. These legal relationships defy characterisation as individualistic or primarily self-interested and pose an analytical problem for statist and realist theory.

This book challenges the view that international law can be reduced to the maximisation of individual state interests. It does not deny that states often act in self-interested ways, and that international legal rules reflect or permit such behaviour. Neither does it aim to suggest that this is, in and of itself, wrong. Instead, the book is a humble reminder that people are capable of acting, and perhaps even predisposed to act, in altruistic ways. The altruism that exists in international society is also reflected in and often encouraged by international legal rules. This book's basic premise is that the normative system of international law is a complex one where altruistic tendencies go hand-in-hand with other, often opposite, tendencies. It aims to show that cosmopolitan altruism is more omnipresent in the fabric of international law than commonly thought. The book also serves as a warning that the altruistic behaviour of states can wax and wane at different points in time, and illustrates that altruistic promises made in

[1] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1718–1719.

the substance of international law can be vulnerable because of the form they take, not least as flexible legal standards. But promises should be kept and this book suggests several ways to help ensure they are.

The Evolution of International Legal Relationships

Understanding the nature of legal relationships is central to this inquiry. I argue that there have been several major turns in the evolution of international legal obligations. Traditionally, obligations existed horizontally between states at the international level,[2] and the Westphalian order came to require that international law regulated state-to-state relations.[3] The well-known *Lotus* case of 1927 is symbolic of this traditional approach, and the following passage from that case brings this nature of legal relationships into sharp focus:

> 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 by usages 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.[4]

[2] Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens, 1964). In this book Friedmann highlights a variety of changes to the structure and content of international law, from its reach over new subject matter like economic co-operation and its inclusion of all civilisations around the world to its adaptation to different ideologies and new technologies. Moreover, Friedmann argued that there were three main levels of international law: (i) the law of co-existence; (ii) the law of co-operation at the universal level; and (iii) the law of co-operation at the regional level; on the centrality of sovereignty to the international legal order, see Steve Smith, 'Reasons of State' in David Held and Christopher Pollitt (eds.), *New Forms of Democracy* (Sage, 1987), 192–217; Kalevi J. Holsti, *International Politics: A Framework of Analysis* (5th ed., Prentice Hall, 1988). Arguing that the inter-state model preceded the human rights model, see Daniel Levy and Natan Sznaider, 'The Institutionalization of Cosmopolitan Morality' (2004) 3(2) *Journal of Human Rights* 143, 144; Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994-VI) *Collected Courses of the Hague Academy of International Law* 234 (noting the shift from bilateral legal relations between states which characterised classical international law to a system becoming more oriented towards the community interests of all human beings); Georges Abi-Saab, 'Cours general de droit international public' (1987-VII) *Collected Courses of the Hague Academy of International Law* 207, 460 (describing the change in the structure of international law as an evolutionary process).

[3] Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, 2006), 23.

[4] *The Case of the S.S. Lotus (France* v. *Turkey)*, PCIJ Series A, no. 10 (1927), 18.

That international legal obligations would be almost exclusively of a horizontal character would change after the atrocities of the interwar period. With the development of international human rights in the last century,[5] vertical obligations between states and their own peoples became a cause for international concern.[6] Following the horrors perpetrated by the authoritarian regimes of the 1930s and 1940s, the need for national human rights protection with international oversight became apparent and there was a growing consensus that traditional conceptions of absolute sovereignty had to be reconsidered.[7] Since then human rights protection has broadened and deepened, particularly in terms of the types of obligations and mechanisms of supervision. The universalisation of international human rights protection in the post-war period is symbolised not least by Article 28 of the Universal Declaration of Human Rights of 1948, which provides that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in the

[5] This includes the emergence of a myriad of human rights treaties, many of which will be referred to in this project. For example, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221; Convention on the Prevention and Punishment of Genocide, 9 December 1948, 78 UNTS 277; Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, 7 September 1956, 266 UNTS 3; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; American Convention on Human Rights, 22 November 1969, 1144 UNTS 123; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195; International Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13; African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

[6] Malcolm Shaw, *International Law* (5th ed., Cambridge University Press, 2003), 232: 'individuals have become increasingly recognized as participants and subjects of international law … primarily but not exclusively through human rights law'. See also Giorgio Gaja, 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21 *European Journal of International Law* 11–14; Andrea Bianchi, '*Ad-Hocism* and the Rule of Law' (2002) 13(1) *European Journal of International Law* 263, 269 (noting the 'complexity and emerging vertical structure' of the international legal order pointing 'to an evolutionary process, which, though far from being fully achieved, is well under way').

[7] See Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd ed., Oxford University Press, 2008), 22.

Declaration can be fully realized'.[8] States committed to creating the international conditions that would allow all people to enjoy the basic rights and freedoms to which they were entitled.

In fact, the international legal framework has been humanised in various dimensions.[9] Alongside the emergence of international human rights law, since the Nuremburg military tribunals the individuation of punishment has become a feature of international justice through the definition of international crimes, the increasing acceptance of universal criminal jurisdiction and the proliferation of international criminal courts. This development is in contrast to the approach taken in the aftermath of World War I when there had been a focus on state aggression and collective sanctions.

This evolution in the protection of human beings at the international level after World War II was characterised by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY) as a 'trend towards the so-called "humanisation" of international legal obligations', which could also be evidenced by a retreat from reciprocity in recent years.[10] The Tribunal went on to observe that this 'trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it'.[11] Similarly, in a different case the ICTY observed that:

[8] Universal Declaration of Human Rights, 10 December 1948, 999 UNTS 302; see also, for example, Jonathan Charney, 'Universal International Law' (1993) 87 *American Journal of International Law* 529.

[9] See, for example, Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 *Australian Yearbook of International Law* 82, (noting in 1988 in particular that '[t]he last few years have witnessed an ever-expanding number of contexts in which those norms are being invoked. International development assistance has become far more human rights-conscious than was the case a decade ago, labour rights issues are intruding further and further into the international trade regime, and the very legitimacy of governments is being regularly assessed on the basis of their compliance with international human rights norms'); Ruti Teitel, *Humanity's Law* (Oxford University Press, 2013); Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015); Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Brill, 2010).

[10] Case no. IT-95–16-T, *The Prosecutor* v. *Kupreskic et al.*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, 14 January 2000, para 518.

[11] *Ibid.*

> [T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law. . . . A State-sovereignty-oriented approach has gradually been supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.[12]

But another turn in the normative orientation of international legal rules is also apparent in the aftermath of World War II, namely a concern for the other. A number of significant conventions that are fundamental to the universal humanisation of international law were adopted throughout this period, including the Convention on the Prevention and Punishment of the Crime of Genocide 1948,[13] the International Covenant on Civil and Political Rights 1966[14] and the International Covenant on Economic, Social and Cultural Rights 1966.[15] Moreover, the scope of the Geneva Conventions was expanded.[16] Further still, the emergence of *jus cogens* and *erga omnes* obligations was made possible by a culture of widely shared values in the international community. There was, generally speaking, a crystallisation of certain universal norms.

Early in the second half of the twentieth century there were signs of an emerging solidarity with people of third states through the emergence of, for example, the principle of non-refoulement in the Convention Relating to the Status of Refugees 1951[17] or the various legal and political measures crafted to catalyse development, including the creation of the New International Economic Order and a legal framework around the right to development.[18] An early (if controversial) example

[12] Case no. IT-94–1-I, *The Prosecutor* v. *Tadić*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 97.

[13] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[14] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

[15] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

[16] Protocols I and II additional to the Geneva Conventions, 8 June 1977, 1125 UNTS 3.

[17] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

[18] See, for example, Declaration on the Establishment of a New International Economic Order, UN General Assembly Resolution 3201, 1 May 1974, UN Doc. A/RES/3201 (S-VI); Charter of Economic Rights and Duties of States, UN General Assembly Resolution 3281 (XXIX), 12 December 1974, UN Doc. A/RES/3281 (XXIX); Declaration on the Right to

of this solidarity may be found in Article 73 of the UN Charter,[19] which provides that

> [m]embers of the United Nations which have or assume responsibility for . . . territories whose people have not yet attained a full measure of self-government . . . accept as a sacred trust the obligation to promote to the utmost . . . the well-being of inhabitants of the territories.

It has been argued that this provision in particular shows how states may be under a moral obligation towards people in other states or even communities that do not belong to a state as such.[20] Indeed, these types of obligations are also evident in the context of the right to food, the legal provision for which envisages a role for third states in its implementation.[21] Similarly, legal commitments made to people in other countries are also evident in the interpretations of major multilateral treaties and principles, including the prevention of genocide, torture and breaches of international humanitarian law, as well as expanding notions of solidarity, which will all be explored in the chapters to follow. Moreover, the law of state responsibility is evolving, particularly with respect to obligations on bystanders. In this context, some international legal scholars have observed that international law now has a framework for the protection of populations through the shared responsibility of bystanders.[22]

The atrocities that took place in the Balkans and Rwanda in the 1990s prompted a change in the international community's attitude to the internal conflicts of states, particularly that they came to be perceived as a threat to international peace and security.[23] Subsequently, judicial mechanisms were set up by the Security Council to prosecute those who committed international crimes in those internal conflicts. As such, law

Development, General Assembly Resolution 41/128, 4 December 1986, UN Doc. A/RES/41/128.

[19] Charter of the United Nations, 26 June 1945, 1 UNTS XVI.

[20] John Philippe Rushton, *Altruism, Socialization, and Society* (Prentice Hall, 1980), 2.

[21] See, for example, Food Assistance Convention, 25 April 2012, 2884 UNTS 3.

[22] André Nollkaemper, '"Failures to Protect" in International Law' in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 439. See also, André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359. For an earlier example of a diagonal obligation upon states to protect foreign nations from injury by private actors, see FV Garcia Amador, Louis Bruno Sohn, and Richard R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Martinus Nijhoff Publishers, 1974), 28.

[23] See, for example, UN Security Council Resolution 713, 25 September 1991 (Socialist Federal Republic of Yugoslavia) and UN Security Council Resolution 836, 4 June 1993 (Bosnia and Herzegovina); UN Security Council Resolution 918, 17 May 1994 (Rwanda).

was used as a tool for both deterrence and reconciliation. Moreover, after the North Atlantic Treaty Organization's (NATO) intervention in Kosovo, the responsibility to protect (R2P) doctrine emerged. The conceptual development of this doctrine helped to fundamentally re-characterise the notion of sovereignty as responsibility and placed a moral obligation on the international community to intervene where a state fails to discharge its responsibility to its population.[24] According to the rhetoric of R2P, states have a fallback responsibility to ensure the most fundamental human rights are guaranteed to people in other countries. The emergence of R2P is an important aspect of a broader normative turn to human security in international law's response to the most serious human crises.[25]

The concept of international cooperation has played a role in urging states to assist with the proliferation of peace, human rights, development and environmental protection in third states. The importance of cooperation and its implications for ensuring the needs of others are taken into account was underlined in 2005 by the Secretary-General of the United Nations, who wrote in his report *In Larger Freedom* that:

> the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States. Such cooperation is possible if every country's policies take into account not only the needs of its own citizens but also the needs of others. This kind of cooperation not only advances everyone's interests but also recognizes our common humanity.[26]

Increasing interdependence, the need for cooperation and the erosion of traditionally conceived sovereignty is also evident in various aspects of the evolving architecture of the world order. One example is the creation of various international mechanisms for monitoring the domestic implementation of international human rights norms, such as expert committees and special rapporteurs, which have also become more numerous and prominent over time.[27] Indeed, this development is part of a phenomenon

[24] See, for example, 2005 World Summit Outcome, UN General Assembly Resolution 60/1, 24 October 2005, UN Doc. A/RES/60/1, paras 138 and 139.

[25] See, for example, Grant Marlier and Neta C. Crawford, 'Incomplete and Imperfect Institutionalisation of Empathy and Altruism in the "Responsibility to Protect" Doctrine' (2013) 5 *Global Responsibility to Protect* 397.

[26] UN Secretary General's Report, *In Larger Freedom: Towards Development, Security and Human Rights For All*, 21 March 2005, UN Doc. A/59/2005, 6 (para 18).

[27] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed., Cornell University Press, 2013), 3 4.

that may be characterised as 'international proceduralization'.[28] In this way, states are held accountable at the international level for their internal human rights protection in a way they had not been before through bodies like the Human Rights Council, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. As will be seen, these mechanisms have played an important role in the institutionalisation of altruism.[29] They help to expand our circle of empathy such that we can better relate to the experience of those in far-away places and assist with triggering an altruistic response to others who are in need.

In the context of development, many initiatives that followed the 1969 UN General Assembly Declaration on Social Progress and Development illustrate a growing solidarity with the cause of development for all peoples.[30] This can be seen with the creation of Official Development Assistance (ODA), which states have committed to providing in an amount of 0.7 per cent of their gross national product (GNP). Furthermore, the 1986 Declaration on the Right to Development illustrates that states were willing to commit to creating the conditions for the emergence of the right to development for all to enjoy.[31] The most recent evolution in this area is the Sustainable Development Goals of 2015, which aim to 'end poverty in all its forms everywhere'.[32] These goals are universal in their application, both in terms of their beneficiaries and of the states required to take action or commit resources to ensure they are realised.

A variety of developments that show an increasing solidarity among nations are also notable in the area of environmental protection.[33] The *Trail Smelter* case,[34] the Stockholm Conference of 1972, the Rio

[28] Joseph Weiler and Iulia Motoc, 'Taking Democracy Seriously: The Normative Challenges to the International Legal System' in Stefan Griller (ed.), *International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order* (Springer, 2003), 68–69.

[29] Marlier and Crawford, 'Incomplete and Imperfect Institutionalisation of Empathy and Altruism in the "Responsibility to Protect" Doctrine'.

[30] Declaration on Social Progress and Development, UN General Assembly Resolution 2542 (XXIV), 11 December 1969, UN Doc. A/RES/2542 (XXIV).

[31] Declaration on the Right to Development, General Assembly Resolution 41/128, 4 December 1986, UN Doc. A/RES/41/128.

[32] Transforming Our World: The 2030 Agenda for Sustainable Development, UN General Assembly Resolution 70/1, 25 September 2015, UN Doc. A/RES/70/1, para 59.

[33] See, for a more detailed presentation of developments, Benedict Kingsbury, 'The International Legal Order' in Peter Cane and Mark Tushnet (eds.), *Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 271.

[34] *Trail Smelter Case (United States, Canada)*, Arbitral Tribunal, 3 UN Rep. Int'l Arb. Awards 1905 (1941).

Conference of 1992, the UN Framework Convention on Climate Change of 1992 and the Convention on Biological Diversity of 1992[35] all represented important normative milestones for the international community in the pursuit of global environmental governance, and required profound international cooperation. In a similar way, international courts and tribunals have been assertive in protecting common environmental interests.[36] At the heart of the protection of the environment are the principles of preventing transboundary harm, sustainable development, the common heritage of humankind and the responsibility to future generations. All are inherently other-oriented concepts. Today, a greater emphasis is placed on facilitating universal compliance with global environmental objectives, in the context of which financial support and technology transfer – particularly from the developed to the developing world – have an important role to play. Indeed, the principle of common but differentiated responsibility has become a cornerstone of contemporary international environmental law. As such, environmental obligations include commitments by states to other states or to individuals outside of their traditional polity of interest.

This brief survey of the major turns in the international legal order – from state coexistence to humanisation to concern for those in other countries – helps to frame the subject matter of this book. I also hasten to add that these turns do not represent wholescale change in the nature of the international legal order, they are not mutually exclusive but rather new dimensions added to an increasingly complex corpus of legal rules that cannot solely be characterised as reflecting self-interest. We will explore this further in the next section.

The Dimensions of Altruism in International Law

As is becoming evident from this overview of the evolving character of international legal norms, there has been a turn towards human

[35] United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107; Convention on Biological Diversity, 5 June 1992, 1760 UNTS 69.

[36] See, for example, cases such as *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment (1997) ICJ Rep. 7; *Southern Bluefish Tuna (New Zealand* v. *Japan; Australia* v. *Japan)*, Provisional Measures, ITLOS Case Nos. 3 and 4 (27 August 1999); *Iron Rhine Arbitration (Belgium/Netherlands)*, XXVII (2005) Reports of International Arbitral Awards 35; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, Judgment (2014) ICJ Rep. 226; see also, Markus Benzing, 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 *Law and Practice of International Courts and Tribunals* 369.

protection and a more acute concern for the plight of individuals in all countries. My proposition is that norms with an altruistic orientation are increasingly apparent in positive international law and its interpretation, and this presence reveals an ethical substratum in international law that has cosmopolitan features. Cosmopolitan ideology can help to explain the evolving anthropocentrism in international law.[37] This anthropocentrism is manifested both in the way states guarantee a growing corpus of rights to their own people and the way in which states are increasingly concerned for the rights and welfare of people in other states or future generations. The former is the dominant trend whereas the latter has been less prominent, more nuanced and subject to resistance.[38] Altruistic commitments to the other are nevertheless present in the fabric of international law and it will be the task of this book to ask why, how and what: why they have emerged, how they have infiltrated international law, and what their content and form are.

Such altruistic legal relationships have received some attention in the legal literature,[39] but have often been ascribed different labels and analysed in a wide variety of ways. For example, distinctions have been made between so-called 'state by-stander responsibility', which involves a responsibility (including positive obligations) to protect people from

[37] See Richard Shapcott, *International Ethics: A Critical Introduction* (Wiley, 2010), 1794–1795. See also, Jason Rudall, 'A Cartography of Cosmopolitanism: Particularising the Universal' (2014) 3(3) *Cambridge Journal of International and Comparative Law* 747.

[38] This is consistent with claims made by Kantian cosmopolitan theory about the centrality of states and state interests in the international order more generally. See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd ed., Columbia University Press, 1977), Chapter 2 (presenting the Kantian view).

[39] See, for examples of scholarship on altruistic-type legal relationships, Lea Brilmayer and Isaias Yemane Tesfalidet, 'Third State Obligations and the Enforcement of International Law' (2011) 44(1) *International Law and Politics* 1; Monica Hakimi, 'State Bystander Responsibility' (2010) 21(2) *European Journal of International Law* 341; Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) *Human Rights Law Review* 1; Carla Bagnoli, 'Humanitarian Intervention as a Perfect Duty: A Kantian Argument' in Terry Nardin and Melissa Williams (eds.), *Humanitarian Intervention* (New York University Press, 2006); Kok Chor Tan, 'The Duty to Protect' in Nardin and Williams (eds.), *Humanitarian Intervention*; Jennifer Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 *Global Responsibility to Protect* 213; Nollkaemper, 'Failures to Protect in International Law' in Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*; John H. Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds.), *Universal Human Rights and Territorial Obligations* (University of Pennsylvania Press, 2010). For a fuller consideration of this literature and for examples of practice, see *infra*.