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International Law in World Politics

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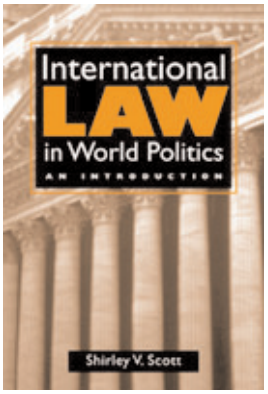

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International Law and World Politics Entwined

International law is a system of rules, principles, and concepts that governs relations among states and, increasingly, international organizations, individuals, and other actors in world politics. International law has grown and expanded at a rapid rate since World War II to encompass a diverse range of issues and topics, including the preservation of the marine environment, the right to use force against another state, territorial rights in Antarctica, the use of outer space, and the rights of children. There is now no aspect of world politics that can be fully understood without some knowledge of international law and an awareness of how it operates as an integral component of global affairs. International law is also having an impact on national legal systems to an unprecedented extent. National court cases may turn on a point of international, rather than municipal, law, and national decisionmakers must now consider a constantly increasing number of international law obligations in the policymaking process. Indeed, international law now affects the life of every individual. Even persons living in a remote village in a small island state may have their livelihoods affected by the terms of a global treaty on trade while relying on a treaty on climate change to ensure the very survival of their island state. Citizens of the former Yugoslavia are looking to international law to restore justice and hope after years of civil war and human rights atrocities, just as indigenous leaders are seeking avenues in international law by which to improve the lot of their peoples and to increase their voice in international affairs. As the world becomes more globalized, there is a a need for all informed citizens to gain an appreciation of the mechanism by which so many interstate and transnational links are forged and maintained.

If we are to understand how this system operates within world poli-

tics we need to appreciate that international law, although an integral part of politics, is also to a large extent autonomous. International law has considerable cohesion as a system of interrelated rules, principles, and concepts that, although operating within the political milieu, are to some extent distinct from it. A political term such as "sovereignty" or "state" may also be used within the system of international law but with a different meaning. Chapters 1–4 in this book will consider further the entwining of international law with politics before we focus in Chapter 5 on the autonomy of the system of international law.

How Does International Law Compare with Law in the Domestic Context?

Whether we are aware of it or not, most of us approaching international law for the first time intuitively bring certain assumptions about law in a domestic situation and expect international law to be the equivalent at an international level. This can be an asset where there are similarities between the two, but there are some aspects of the system of law in most liberal democracies that do not have an obvious parallel at the international level. We will begin by making some comparisons between domestic (i.e., "municipal") law and international law. To those whose main interest is world politics, it may at first seem strange to realize that an understanding of international law is essential to understanding political dynamics. Let us then begin our brief comparison by considering how it is that law—whether domestic or international—can be considered integral to political processes.

A political system can be defined as "any persistent pattern of human relationships that involves, to a significant extent, control, influence, power, or authority."[1] We often think first of national political systems, such as those of the United States or of India, but we can also talk about the politics internal to a school, or even to a family. When we analyze the operation of a political system we find that not everyone has equivalent power. In other words, control over political resources—the means by which one person can influence the behavior of other persons—is not distributed evenly.[2] The study of politics is in large part the study of the process that determines who gets what and who can do what in a particular political unit. At a national level in a democracy, the legislature makes and implements political decisions by passing legislation. Legislation is law, and so we can see that law is one mechanism through which politics may be conducted. And of course another domestic arena in which decisions are made that impact the distribution

of the benefits of society is the courtroom. A legal judgment can have an immediate impact, for example, on who receives a family's inheritance, or on whether indigenous peoples have the same rights to land as other members of society. Politics and law are thus intimately related.

In the same way that domestic politics is entwined with law, international law is integral to world politics and may impact the global distribution of power. A free trade agreement may benefit the exporting countries more than the importing countries. The International Court of Justice (ICJ) may delimit a maritime boundary between two states that then determines which country is able to exploit valuable oil resources. International law is integral to international structures of power, but the place of international law in world politics cannot be appreciated unless one has a basic understanding as to how the system of international law functions. As a first step toward this goal it may be useful to draw some more comparisons and contrasts between the legal and political systems of modern liberal democracies and those in the international arena.

A Legislature to Make the Law?

One of the most important distinctions between the domestic legal system of liberal democratic societies and the system of international law is that there is no international legislature to pass legislation and "make law." Although this difference is sometimes lamented, it is worth pondering a larger question: If there were to be a world government, of whom would we want it to be made up? The closest equivalent in world politics to a domestic legislature is the United Nations (UN) General Assembly. Every member state represented in the General Assembly gets one vote, but the resulting decision is not law in the same way that an act of parliament or congress is a law. A General Assembly resolution is a political decision that may indicate the direction law is likely to take but that most lawyers do not recognize as "law."

If international law is not created by legislation, from where, then, does international law come? To put it differently: If we wanted to find what the rules, principles, and concepts of international law had to say on a subject—for example, hijacking or maritime safety—where would we go to find out?

Treaties. The main source of international law today is treaties, also known as conventions. Treaties are agreements between states, between states and international organizations, or between international organizations. A *bilateral treaty* is an agreement between two parties. International organizations commonly make agreements with their host

state or with a state in which they are conducting a conference. An example of one type of bilateral treaty between states is the extradition treaty, which governs the surrender of fugitives from justice by the fugitive's state of residence to another state claiming criminal jurisdiction. Another example of a bilateral treaty is a status of forces agreement (SOFA), which provides for the legal status of military forces and the conditions under which one state can station them in another state. A SOFA includes, for example, which state has the primary duty to investigate and prosecute members of the armed forces suspected of committing crimes in the receiving state. The United States has concluded SOFAs with more than fifty countries in which its troops are stationed or operating.[3] These have often been controversial in the domestic politics of the host countries. In the 1960s the proposed U.S.-Iran SOFA and the exemption it would grant U.S. military personnel from the jurisdiction of Iranian courts was held up by Ayatollah Ruhollah Khomeini as distastefully reminiscent of the colonial domination of Iran.[4] More recently, the North Atlantic Treaty Organization (NATO)'s 1951 SOFA[5] became the subject of controversy following an incident in which a U.S. Marine EA-6B Prowler on a low-level training flight in the Italian Alps severed a cable-car line, killing twenty people.[6] The U.S.-Japan SOFA came to the fore as an issue in 2002 in relation to rape and arson attacks by U.S. servicemen in Okinawa.[7] The revision of the U.S.-South Korea SOFA became an issue in June 2002 after two U.S. soldiers driving an armored mine-clearing vehicle in South Korea crushed two schoolgirls to death; the United States court-martialed the two service personnel, but they were acquitted and rapidly transferred out of the country. Following the terrorist attacks of September 11, 2001, in New York City and Washington, D.C., the United States quickly concluded a SOFA with the Kyrgyz Republic in Central Asia, prior to basing combat and combat support units at Manas as part of Operation Enduring Freedom.[8]

In the context of antiballistic missile (ABM) control, the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) between the United States and the Soviet Union, another bilateral treaty, was designed to prevent either state from deploying a nationwide ABM system for defending its territory. The treaty was premised on the doctrine of "mutually assured destruction" (MAD) as a deterrent to the use of nuclear weapons. The U.S. administration under President Bill Clinton sought to modify the treaty to permit the deployment of a limited national missile defense system but failed to win the agreement of Russia. Although the ABM Treaty is of unlimited duration, its terms provide that each party has the right to withdraw, upon

six months' notification, if it decides that extraordinary events related to the subject matter of the treaty have "jeopardized its supreme interests." In 2001 President George W. Bush decided to abandon the ABM Treaty. The 2002 Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, providing for the reduction and limitation of strategic nuclear warheads, is another example of a bilateral treaty relating to arms control.[9]

Multilateral treaties are agreements between three or more states. Those states may belong to one geographical region—it may be an African regional treaty on human rights, for example; or the treaty may aim at global participation in order, for example, to protect the global climate. Approximately 4,065 new multilateral treaties appeared between 1945 and 1995, an average of almost ninety per year.[10] The entwining of international law with world politics is evident in the realm of treaties insofar as treaties are the product of negotiations between states and states can be expected to approach negotiations—whether on trade or marine pollution—as a political exercise. Each state will bring its own political objectives and strategies to the negotiating table, and as the product of those negotiations, the resultant treaty text is likely to reflect the political compromises that were required to reach agreement.

A treaty is usually dated to the year there is agreement on the text. This may differ significantly from the date on which the treaty becomes law and the parties become bound by its terms. The text of the Third United Nations Convention on the Law of the Sea (UNCLOS III), for example, was agreed to in 1982, but the convention did not receive the necessary support to enter into force until 1994. The UN Charter requires members to register all new treaties with the UN Secretariat, which publishes them in the United Nations Treaty Series (UNTS), available in hard copy and on the Internet.[11] Other places in which to locate treaties are *International Legal Materials*, the *League of Nations Treaty Series,* the *United Kingdom Treaty Series*, and Internet collections including the Multilaterals Project at the Fletcher School of Law and Diplomacy at Tufts University, Massachusetts.[12]

A treaty is divided into articles and, within an article, into paragraphs and subparagraphs. "Article 48(4)(a)" refers to "article 48, paragraph 4, subparagraph (a)." In a long treaty articles may be grouped into chapters, sections, and parts. The treaty may include annexes, and there may be subsequent treaties that build on it, usually referred to as "protocols."

The earliest known treaty dates from around 3000 B.C., preserved

on a border stone between Lagash and Umma in Mesopotamia.[13] The important contemporary principle of *pacta sunt servanda*—states are bound to carry out in good faith the obligations they have assumed by treaty—is thought to derive from the fact that early treaties were often considered sacred.[14] And though states are expected to carry out their treaty obligations in good faith, a state is not bound by treaties to which it is not a party. This is because a state is, by definition, *constitutionally independent*, which means that a state must *consent* to be bound by a treaty before it becomes bound, consent being another basic concept in the system of international law.

We will look at the concept of consent more fully in Chapter 5 and at multilateral treaties in more detail in Chapters 7 and 8.

Custom. The second most important source of international law today is custom. Custom is created by what states do, where that action is carried out with a view to the rules and principles of international law. Customary international law was at one time the most important source of international law. As an example, the rules on the treatment of diplomats evolved through custom. The treatment by one state of the representative of another may have been accepted as valid, or it may have been the subject of protest and discussion. Rules gradually evolved as to how states would treat diplomats, and those rules are termed "customary international law." Custom is in many cases codified into a treaty; when formulated into a written document, the rules, principles, and concepts naturally appear more precise and are less subject to change. The customary international law relating to the treatment of diplomats was to a large extent codified in the 1961 Vienna Convention on Diplomatic Relations.

Not everything that a state does or does not do contributes to customary international law. Certain habitual practices may emerge; all diplomatic stationery may be of a certain color, for example, for purely pragmatic or practical reasons. The practice of a state can be used as evidence of custom only if the *opinio juris* component is present (i.e., that the state has been choosing to act in that way for reasons of law). Custom can be quite a slow way of creating law, although that is not always the case. The law that the airspace superjacent to land territory, internal waters, and the territorial sea is a part of state territory, and that as a consequence other states may use such airspace for navigation or other purposes only with the agreement of the territorial sovereign, developed in a relatively short period with the development of aviation and the impact of World War I.[15]

The entwining of international law with world politics is evident in relation to custom in that it may well have been specific political goals that prompted a state to engage in a particular practice (or not to act). The U.S. response to the terrorist attacks of September 11 and the attitude of other states to that response appear to have confirmed an evolution of customary international law to include a right to use force in self-defense against a terrorist attack (see Figure 1.1).

There is usually some room for maneuver in arguing whether or not a particular rule of customary international law exists. Here we get another glimpse of where politics enters the equation. If one is representing a state before the International Court of Justice, one person is likely to argue for or against the emergence of a particular principle or rule of customary international law on the basis of one's overall case and strategic goals. We will be looking at international customary law in more detail in Chapters 3 and 5.

A Police Force to Enforce the Law?

Apart from there not being an international legislature, another major difference between most domestic legal systems and the system of international law is that there is no international police force to enforce compliance. For many, this is a great deficiency of international law and the reason why international law is not more politically effective. It might seem that if states were compelled to respect international law on, say, the use of force, we would live in a much more peaceful and ordered world. The great hiccup here is the concept of *sovereignty* and the related concept of consent. International law operates in a state-based system that is anarchical, meaning that there is no overarching government, and international law is, at least theoretically, a horizontal system made up of sovereign equals. The same question that was posed in the context of a world government can be posed here: If there were a country or body tasked with enforcing international law, which would we want it to be?

We must also be careful not to push too far our domestic analogy of law enforcement by police. The police forces in a domestic system primarily enforce criminal law. The bulk of international law governing relations among states does not address the criminal behavior of states but is better compared to the civil law of rights and wrongs, claims and defenses, and in a municipal system the outcomes of these matters are usually negotiated or settled through courts, much as they are in international law.

There are some methods for enforcing international law, although when viewed as a whole the picture may still look patchy. Individual

Figure 1.1 Customary International Law and the Right to Use Force in Response to a Terrorist Attack

The right of a state to defend itself is well established in customary international law. It was also incorporated into treaty law as article 51 of the United Nations Charter. The type of attack on a state envisaged by the drafters of the Charter was, understandably, that of one state against another. Debate began in the 1980s as to the right of a state to respond with force to terrorism under article 51. When in 1986 the United States claimed that its bombing of military targets in Libya in response to an explosion at the LaBelle disco in Berlin, which killed two U.S. servicemen and wounded seventy-eight Americans, was an act of self-defense, international reaction was largely negative.[i] A draft UN Security Council resolution condemning the strike was supported by a majority of members of the Security Council but was vetoed by France, the United States, and the United Kingdom.[ii] A U.S. missile attack on June 26, 1993, which destroyed the Iraqi intelligence headquarters in Baghdad, taken in response to an alleged Iraqi plan to kill former U.S. president George H. W. Bush was again justified as self-defense. This time the majority of Security Council members accepted the U.S. position that the attack was a justified act of self-defense, although China and some Islamic states voiced criticism.[iii]

On August 20, 1998, the United States launched seventy-nine Tomahawk cruise missiles at targets associated with Osama bin Laden's Al-Qaida network, including paramilitary training camps in Afghanistan and a pharmaceutical factory in the Sudan that the United States claimed had been providing or storing a precursor chemical used in chemical weapons.[iv] Bin Laden had been linked to the bombing on August 7, 1998, of U.S. embassies in Nairobi, Kenya, and Dar es Salam, Tanzania. The United States argued that the strikes were in self-defense consistent with Article 51 of the UN Charter. Russia condemned the attacks, as did Pakistan and several Arab countries. The Non-Aligned Movement condemned the U.S. attack as "unilateral and unwarranted," and in September UN Secretary-General Kofi Annan criticized "individual actions" against terrorism, implying disapproval of the U.S. strikes.[v] Most U.S. allies

(*continues*)

Figure 1.1 continued

supported the attacks, although France and Italy issued only tepid statements of support.

Following the terrorist attacks of September 11, 2001, the United States constructed an extensive coalition. NATO and parties to the Inter-American Treaty of Reciprocal Assistance identified the terrorist attacks as "armed attacks," as referred to in Article 51, and the United States drew a strong link between the Taliban regime and Al-Qaida, thus implicating a state in the "armed attack" as would traditionally have been expected under article 51. In a letter to the Security Council dated October 7, the United States stated that it had initiated actions "in the exercise of its inherent right of individual and collective self-defense."[vi] Following Operation Enduring Freedom, and the wide support given to the U.S.-led coalition bombing in response to September 11, it could be said that customary international law has evolved such that the right of self-defense now includes military responses against states that actively support or willingly harbor terrorist groups.[vii]

Notes

i. Alan D. Surchin, "Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad," *Duke Journal of Comparative and International Law* 5 (1995): 457–497.
ii. Draft text no. S/18016/Rev.1, S/PV.2682, April 21, 1986, p. 43.
iii. Surchin, "Terror and the Law," 467–468.
iv. Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law," *American Journal of International Law* 93, no. 1 (1999): 161–194, 161.
v. Jules Lobel, "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan," *Yale Journal of International Law* 24 (1999): 537–557, 538.
vi. Letter to Security Council from the Permanent Representative of the United States of America to the United Nations, addressed to the President of the Security Council, dated October 7, 2001, UN Doc. S/2001/946 (October 7, 2001), www.un.int/usa/s-2001–946.htm.
vii. Michael Byers, "Terrorism, the Use of Force, and International Law After 11 September," *International and Comparative Law Quarterly* 51, no. 2 (2002): 401–414, 410.

states can attempt to ensure that other states respect the rules of international law in mutual relations by measures of *retorsion*, unfriendly but legal acts, such as the severance of diplomatic relations, used to indicate displeasure with the policies or actions of another state. A second form of enforcement of international law by an individual state is that of *countermeasures*, acts that would be illegal except that they are carried out in response to an illegal act by the other party. Countermeasures must be proportional to the original breach and may not include the use of force.[16] One of the most important ways to ensure compliance with multilateral treaties is to write into the treaty verification measures—ways of checking that the other states that are party to that treaty are complying. Verification measures may include a system of inspections or of reporting. If the UN Security Council believes that there is a threat to international peace, breach of the peace, or act of aggression, it can impose sanctions of an economic, diplomatic, or military nature.[17] The Security Council also has the power to enforce a decision of the ICJ. Article 94(2) of the UN Charter provides that if any party to a case "fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[18] This has never been asked of the Security Council.

Compliance with international law is sometimes promoted by the provision of assistance via an intergovernmental organization (IGO). The United Nations Environment Programme (UNEP), for example, provides technical assistance to help developing countries implement environmental treaty obligations. The United Nations Programme of Technical Cooperation assists with human rights–related activities such as training law enforcement personnel and members of national judiciaries.[19]

National courts sometimes enforce international law. The Alien Tort Claims Act of 1789[20] grants jurisdiction to U.S. federal courts over "any civil action by an alien [someone who is not a U.S. citizen] for a tort only, committed in violation of the law of nations or a treaty of the United States." The reason for the act is not certain, but it was likely intended either to secure the prosecution of pirates or to protect diplomats. The act rose to prominence and became a source of controversy in the early 1980s, since when it has been used to bring cases against both individuals and companies for claimed breaches of international human rights law committed outside the United States. The Torture Victim Protection Act of 1991[21] creates a right for victims, including aliens, of

state-sponsored torture and summary execution in other countries to sue in federal courts.

A Judiciary?

Although there is no international legislature, there is a world court, situated in The Hague. The Permanent Court of International Justice operated from 1922 to 1946, then was replaced by the International Court of Justice, one of the six principal organs of the United Nations. The operation of the ICJ is underpinned by the principle of consent: the ICJ can hear a contentious case between states only if those states have consented to the Court doing so. Again, this may sound extraordinary on first hearing. But there is a fascinating entwining of law with politics evident in a state deciding whether or not to consent to the jurisdiction of the Court. The decision as to whether to be involved in a case before the Court may well be a political decision, but it will be made on the basis of the rules, principles, and concepts of international law and, no doubt, on the prospects of a successful outcome. In some cases, like that relating to Iran's holding of U.S. hostages in Tehran from 1979 to 1981, a state may decide that it is not in its interests to have the case heard by the Court, but the Court will find that the state concerned has, in fact, given its consent. To understand how this could come about requires understanding the relevant law and the political context in which it was functioning. We will be looking at this in more detail in Chapters 5 and 6.

Article 38(1) of the Statute of the International Court of Justice sets out the basis on which the Court is to reach a decision:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>   a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
>   b. international custom, as evidence of a general practice accepted as law;
>   c. the general principles of law recognised by civilised nations;
>   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

We have already considered the first two of these: conventions (i.e., treaties), and customary international law. Although treaties and custom are the two most common sources of international law, it is important to

consider also the rest of article 38(1) because, although in the narrow sense the article refers only to the sources of international law to be drawn on by the ICJ, it is widely held to be a statement of all of the current sources of international law.

The reference to "civilized nations" in article 38(1)(c) refers to the fact that being "civilized" used to be a criterion for participation in the system of international law. This is no longer the case, and it is widely accepted that the phrase "civilized nations" now means "states." The term "general principles" refers to general principles of law common to a representative majority of domestic legal orders, which includes "the main forms of civilization and the principle legal systems of the world."[22] "General principles of law" was included in the ICJ Statute in case gaps remained after the consideration of treaties and custom.[23] The ICJ has also drawn on general principles originating in international relations and general principles applicable to all kinds of legal relations.[24] The principle of good faith, for example, requires parties to deal honestly and fairly with each other.[25] Applied to treaties, this means that a treaty should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[26] A state should not attempt to find unintended meanings in a treaty that would result in it gaining an unfair advantage over the other party.

Article 38(1)(d) refers to judgments of tribunals and courts as well as to the writings of distinguished international lawyers as "subsidiary means for the determination of rules of law." This means that "judicial decisions" such as the judgments of the International Court of Justice, and learned texts by famous international lawyers, can also be looked at to enhance understanding of what international law may have to say on a particular issue. The phrase "subsidiary means for the determination of rules of law" means that judges and the most highly qualified publicists of the various nations do not create law as such but clarify what that law has to say on a particular issue; judicial decisions and learned writings are subordinate to the first three sources.[27]

Although the ICJ is the only international court or tribunal with general jurisdiction, there has in recent years been a proliferation of judicial and quasijudicial bodies with subject-specific jurisdiction.[28] Notable examples include the Law of the Sea Tribunal, established in Hamburg, Germany, under the provisions of the 1982 Law of the Sea Convention, and the Appellate Body of the World Trade Organization. There have been calls for an international environment court.[29] There

are also regional courts and tribunals. The oldest operating in Europe is the European Court of Justice of the European Communities, which began work in 1952 as the Court of Justice of the European Coal and Steel Community.

The Rule of Law

If we accept that law is a part of politics and that politics is about who gets what and how in a particular political order, the most important principle is the *rule of law*.[30] The essence of this principle is that everyone is equal before the law. It does not matter whether one is a wealthy professional, unemployed, or a member of the political bureaucracy; one is subject to the same laws on theft or on murder. Of course, there may well be cases in which individuals do not appear to be treated equally by the law. White-collar crime is less likely to lead to a jail sentence than breaking and entering. Although such examples seem at first glance to undercut the principle of the rule of law, that principle serves as a normative basis for law: it establishes what the law *should* do, even though it does not always do so.

Critics of a law or its implementation often seek to demonstrate its inadequacy by demonstrating that the law is not commensurate with the principle of the rule of law, and they use this as a basis for demanding change to the law or its improved implementation. Mandatory sentencing, which removes the discretion of a judge to vary punishments, has, for example, been criticized by those who believe that, despite purportedly treating all offenders equally, it tends to impact most on those segments of the community who are most likely to commit the type of crime in question. In the Northern Territory of Australia the crimes covered by a scheme of mandatory sentencing that operated between 1996 and 2001 were "crimes of poverty" most likely to have been committed by Indigenous offenders.[31] In 2002 some commentators claimed that the intervention of the Queen of England in the criminal trial of Princess Diana's butler, which led to the prosecution withdrawing the charge and the defendant being declared not guilty, "vividly demonstrated that not everyone is equal before British law."[32] The episode led to calls from inside the Labour Party to reform the Queen's immunity from giving evidence in civil and criminal proceedings.[33] In November 2002 India's human rights commission launched an investigation into the police shooting of alleged Pakistani terrorists who, it appeared, may have been framed by police. Kuldip Nayar, India's former high commissioner to the UK, who complained to the commission, was quoted as saying that

"India is a democracy and it is of vital importance that we uphold the rule of law."[34]

The principle of the rule of law also exists in the system of international law, where it gives rise to the principle of the *sovereign equality of states*.[35] States are the main actors in international law, and according to this fundamental principle all states are legally equal. Of course, just as the principle of the rule of law does not always match reality in a domestic legal system, so it does not do so in the system of international law. In the same way that members of society enjoy differing levels of wealth and opportunity, states differ drastically in terms of history, income, resources, and political systems.[36] There is therefore little prospect of all states carrying equivalent weight in international law. The perceived importance of the United States, as the world's greatest military power, signing the treaty to establish the International Criminal Court (ICC) meant that it could not fail but be more influential than a weak state in the negotiations.

Sometimes small states carry less weight at treaty negotiations simply because they do not have the staff, expertise, or knowledge to contribute; a small state that has only a handful of trained international lawyers cannot hope to match the input of a major power. At the ICC negotiations several sets of negotiations were held simultaneously on different issues, making it impossible for any one delegate to attend more than a small percentage of sessions.[37] It was also notable that the text was drafted only in English; it was several months after the finalization of the treaty that it was available in the other five languages that, according to the Rome Statute of the International Criminal Court itself, are "equally authentic."[38] The principle of the sovereign equality of states nevertheless plays a normative role within the system of international law and gives rise to specific rules regarding the operation of the system. Some states may carry more negotiating weight than others, but a state is not bound by a treaty if its consent was procured through the coercion of its representative, and a treaty is void if it has been procured by the threat or use of force.

International Law and Power

International law is closely related to the political context in which it operates. What is fascinating, however, is to try to discern the exact nature of the relationship between the two. It has been a mainstream assumption in the study of international relations since 1945 that international law has little impact on the "real world" of politics—at least

when it comes to the hard-core issues of war and peace. It is a perspective closely related to the realist school of international relations theory, which focuses on states as the principal actors in world politics, and sees them as being in a constant struggle to compete for greater power (and thereby security). Realists have generally conceptualized power as emanating from tangible factors such as military and economic might. This leaves no room for an independent role for international law. Realism has a long tradition in the study of international relations; in fact it was in existence long before international relations emerged as a discipline. Although the discipline of international relations is usually dated from the early years after World War I, *The History of the Peloponnesian Wars*, written by Thucydides in about 400 B.C., is often considered an early realist work. Realist thinking continues to dominate government thinking, and its influence extends to most of those working for international organizations such as the United Nations.[39]

The empirical literature inspired by realist thought generally adopts a simplistic attitude toward international law, and assuming that the law has no important role to play, often leaves it out of the story altogether. Hence, the bulk of writing on what is generally regarded as having been the most serious crisis during the Cold War—the Cuban Missile Crisis—makes no mention of international law. The U.S. decision to impose a "quarantine" around Cuba, to prevent Soviet ships carrying nuclear missiles capable of targeting the United States from reaching Cuba, is often discussed with no reference to the legality of such a quarantine. This makes for a rather skewed historical account of the episode because the historical evidence points to international law as having featured strongly in the U.S. decisionmaking process. The United States was not prepared to take any action that was categorically illegal and settled for a way of proceeding that was at least of possible legality. Moreover, the United States went to great lengths to justify its actions in terms of international law.

Some realist writers acknowledge the existence of international law but do so in order to dismiss its impact on real world events. Dean Acheson, former U.S. secretary of state, commented in relation to the Cuban Missile Crisis that "the power, prestige and position of the United States had been challenged by another state; and . . . law simply does not deal with such questions of ultimate power. . . . The survival of states is not a matter of law."[40] Hans Morgenthau, the most famous realist thinker of the post–World War II years, was a lawyer by training. The inadequacies of international law were a disappointment to

Morgenthau. Morgenthau portrayed international law as a system seeking to constrain the powerful, and he found it lacking. He was highly critical of what he perceived to be the absence of an effective international judicial system and of serious weaknesses in the system of enforcement. Morgenthau considered that the primitive system of law enforcement made it easy for the strong both to violate international law and to enforce it, thereby putting the rights of the weak in jeopardy.[41]

There would appear to be a considerable element of truth in what Morgenthau thought. Contrary to the ideal of the rule of law, international law has generally supported the powerful. This is perhaps most clearly evidenced in relation to the general prohibition on the use of force in international law; maintenance of peace supports the status quo. Powerful states usually play a greater role than others do in creating the law, and they have a greater capacity to see that the law is enforced against other states. But if this were the whole story, it would be a sad and dull story indeed. And one would wonder why the decisionmakers in less powerful states were so gullible as to continue to support a system designed solely for their exploitation.

International law may be generally supportive of the powerful, but it does on occasion also help the less powerful, whether individually or collectively. Nauru, one of the smallest countries in the world, was able finally to bring Australia—which had administered Nauru under the League of Nations Mandate System and the UN Trusteeship System—to the negotiating table with respect to the rehabilitation of its mined-out phosphate lands, when the proceedings that Nauru had initiated against Australia in the ICJ appeared likely to result in an outcome favorable to Nauru.[42] Consider another example. After World War II a number of smaller states made what at the time seemed to be extraordinary claims to fisheries zones that gradually came to be regarded as part of international law, albeit only when accepted by the powerful states.[43] International law was, similarly, the mechanism by which many new states of the third world emerged as independent entities during the process of decolonization.

Not only does international law assist weaker states to survive in the maelstrom of world politics; international law also serves to constrain, at least to a certain extent and on certain occasions, the actions of the powerful. In his analysis of the functions that international law had fulfilled during the Cuban Missile Crisis, Abram Chayes found that international law had not only been a basis of justification or legitimation for action and provided organizational structures, procedures, and forums; it had been a factor in constraining U.S. policy choices.[44] Other

writers have identified additional functions fulfilled by international law in world politics, including those of "providing rules of the game, fostering stable expectations, positing criteria by which national governments and others can act reasonably and justify their action, and providing a process of communication in a crisis."[45] It has been the concern of many international lawyers that, in the post–Cold War international order in which there is only one superpower, international law does not exert as powerful a constraining influence on the United States as it did in the days when the Soviet Union could more readily check any U.S. breaches of international law.

It is the complexity of the relationship between international law and world politics that is so fascinating. We will be better equipped to consider this complexity once we have a better understanding of the system of international law. We will now go on to look at the main actors in international law.

Notes

1. Robert A. Dahl, *Modern Political Analysis*, 4th ed. (Englewood Cliffs, NJ: Prentice-Hall, 1984), p. 10.

2. Ibid., p. 31.

3. *Treaties and Other International Acts Series of the Department of State* includes those with Antigua and Barbuda (TIAS number 9054), Ascension Island (3603), Australia (5349), Bahamas (11058), Bahrain (7263, 8208, 8632), Canada (2846, 3074), Denmark (2846, 4002), Diego Garcia (6196, 7481, 8230), Egypt (10238), Egypt (10238), France (2846), Germany (2846, 5351, 5352, 7759, 10367), Greece (2846, 3649), Honduras (10890, 11256), Iceland (2295), Italy (2846), Japan (4510), Jamaica (2105), Korea (6127), Luxembourg (2846), Marshall Islands (11671), Netherlands (3174), New Zealand (4151), Norway (2846, 2950), Panama (10032), Papua New Guinea (11612), Portugal (2846), St Lucia (2105), Saudi Arabia (2812, 5830, 7425), Spain (2846), Sudan (10322), Trinidad and Tobago (2105), Turkey (2846, 3020, 3337, 6582, 9901), Turks and Caicos Islands (9710, 9711), and the United Kingdom (2846, 11537). A full list of SOFAS or other agreements conferring legal status on U.S. forces and personnel overseas can be found at www.defenselink.mil/policy/isa/inra/list_of_sofas.html.

4. Gary Sick, *All Fall Down: America's Fateful Encounter with Iran* (London: I. B. Tauris, 1985), p. 10.

5. Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 199 United Nations Treaty Series (UNTS) 67. For commentary, see Dieter Fleck, ed., *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001).

6. W. Michael Reisman and Robert D. Sloane, "The Incident at Cavalese and Strategic Compensation," *American Journal of International Law (AJIL)* 94, no. 3 (July 2000): 505–515.

7. B. Norman, "The Rape Controversy: Is a Revision of the Status of Forces Agreement with Japan Necessary?," *Indiana International & Comparative Law Review* 6, no. 3 (1996): 717–740, esp. 731.

8. "Diplomatic Support for Operation Enduring Freedom," Fact Sheet, U.S. Department of State, August 19, 2002. www.state.gov/coalition/cr/fs/12805.htm, J. D. Crouch II, Assistant Secretary of Defense for International Security Policy, Office of the Secretary of Defense, U.S. Department of Defense, "Defense and Security Cooperation in Central Asia," Remarks Before the Subcommittee on Central Asia and the South Caucasus Committee on Foreign Relations, U.S. Senate, June 27, 2002.

9. 41 International Legal Materials (ILM) 799 (2002)

10. These figures were calculated from the information provided in Christian L. Wiktor, *Multilateral Treaty Calendar 1648–1995* (The Hague: Martinus Nijhoff, 1998).

11. Available at www.un.org/depts/treaty.

12. Available at www.tufts.edu/fletcher/multilaterals.html.

13. Treaty relations were more elaborate in ancient China and India. Christian L. Wiktor, *Multilateral Treaty Calendar 1648–1995* (The Hague: Martinus Nijhoff, 1998), p. ix.

14. Christian L. Wiktor, *Multilateral Treaty Calendar 1648–1995* (The Hague: Martinus Nijhoff, 1998), pp. ix–x.

15. Ian Brownlie, *Principles of Public International Law,* 4th ed. (Oxford: Clarendon, 1990), p. 119.

16. C. Tomuschat, "General Course on Public International Law," *Recueil des Cours* 281 (1999): 376.

17. See articles 39–42 of the UN Charter.

18. Charter of the United Nations, article 94(2), 1 UNTS xvi.

19. Ian Martin, "The High Commissioner's Field Operations," in Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharan, and Alfred de Zayas, eds., *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (The Hague: Martinus Nijhoff, 2001), 403–414.

20. United States Code section 1350. See Ralph G. Steinhardt and Anthony D'Amato, eds., *The Alien Tort Claims Act: An Analytical Anthology* (Ardsley, NY: Transnational, 1999).

21. United States Code section 1359. See Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001).

22. Hermann Mosler, "General Principles of Law," in *Encyclopedia of Public International Law* 2 (1995): 511–527, 516–517. On "general principles" see also, L. G. Lammers, "General Principles of Law Recognized by Civilized Nations," in Fritz Kalxhoven, Pieter Jan Kuyper, and Jahan G. Lammers, *Essays on the Development of the International Legal Order in Memory of H. F. van Panhuys* (The Netherlands: Alphen aan den Rijn, 1980), pp. 53–75; H. Mosler, "To what extent does the variety of legal systems of the world influence the application of the general principles of law within the meaning of article 38(1)(c) of the Statute of the International Court of Justice," in Hugo Grotius, *International Law and the Grotian Heritage* (The Hague: T. M. C. Asser Institut, 1985), pp. 173–185; and M. C. Bassiouni, "A Functional

Approach to General Principles of International Law," *Michigan Journal of International Law* 11 (1990): 768–818.

23. Mosler, "General Principles of Law," p. 516.

24. Ibid., pp. 511–527.

25. Anthony D'Amato, "Good Faith," in *Encyclopedia of Public International Law* 2 (1995): 599–601, 599.

26. Vienna Convention on the Law of Treaties, article 31(1).

27. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London and New York: Routledge, 1997), pp. 56–57.

28. For a table of international judicial bodies, quasijudicial, implementation control, and other dispute settlement bodies, see the Project on International Courts and Tribunals, Supplement to the *New York University Journal of International Law and Politics* 31, no. 4, available at http://www.pict-pcti.org/synoptic/ChartExpl.html.

29. For a discussion of the relevant issues, see Ellen Hey, *Reflections on an International Environmental Court* (The Hague: Kluwer, 2000), and Sean D. Murphy, "Does the World Need a New International Environmental Court?" *George Washington Journal of International Law and Economics* 32, no. 3 (2000): 351–365.

30. Hayek explained that the rule of law means that "government is bound in all its actions by rules fixed and announced beforehand so that it is possible to foresee with fair certainty how authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. A. Hayek, *The Road to Serfdom* (London: G. Routledge, 1944), p. 39.

31. Berit Winge, "Mandatory Sentencing Laws and Their Effect on Australia's Indigenous Population," *Columbia Human Rights Law Review* 33 (2002): 693–732.

32. Peter Wilson, "Queen Tilts Crown, Puts Royals Before Court of Public Opinion," *The Australian* (November 4, 2002), p. 13.

33. See Peter Gould, "The Queen and the law," *BBC News Online,* November 4, 2002, http://news.bbc.co.uk/1/low/uk/2400003.stm, accessed November 8, 2002; and Patrick Wintour and Clare Dyer, "Queen Did Nothing Wrong, Says Blair," *The Guardian*, November 5, 2002, www.guardian.co.uk/Print/0,3858,4539522,00.html, accessed November 8, 2002.

34. Edward Luce, "Shooting of 'Terrorists' Leads to Indian Inquiry," *Financial Times*, November 8, 2002, http://news.ft.com/servlet/ContentServer?pagename=FT.com/StoryFT/FullStory&c=StoryFT&acid=1035873112796&p=1012471727169, accessed November 8, 2002.

35. See R. P. Anand, "Sovereign Equality of States in International Law," *Recueil des Courses* 197 (1986/III): 1–228; R. A. Klein, *Sovereign Equality Among States: The History of an Idea* (Toronto: University of Toronto Press, 1974); P. H. Koojimas, *The Doctrine of the Legal Equality of States: An Enquiry into the Foundations of International Law* (Leyden: Sijthoff, 1964).

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37. Bartram S. Brown, "The Statute of the ICC: Past, Present, and

Future," in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law* (Lanham, MD: Rowman & Littlefield, 2000), pp. 61–84, 62.

38. Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," *European Journal of International Law* 10 (1999): 144–171, 145.

39. Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York: Routledge, 2000), p. 22.

40. Dean Acheson, "Remarks by the Honorable Dean Acheson, Former Secretary of State," *Proceedings of the American Society of International Law* 57, April 25–27, 1963, pp. 13–18, 14.

41. Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace,* 5th ed. (New York: Alfred A. Knopf, 1973), p. 27.

42. V. S. Mani, "International Litigation and Peaceful Settlement of Disputes: A Case Study of *Certain Phosphate Lands in Nauru*," in UN Office of Legal Affairs, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations, and Practitioners in the Field of International Law* (New York: United Nations, 1999), pp. 415–433. See also Antony Anghie, "'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case," *Harvard International Law Journal* 34 (1993): 445–506.

43. A point made by Oscar Schachter, "The Role of Power in International Law," 93 *American Society of International Law Proceedings (ASIL Proc.)* 203 (2000).

44. A. Chayes, *The Cuban Missile Crisis* (New York: Oxford University Press, 1974), pp. 41–42.

45. For the full list, see Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *AJIL* 87 (1993): 205–239, 205.

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