International Law:
Classic and Contemporary Readings

THIRD EDITION

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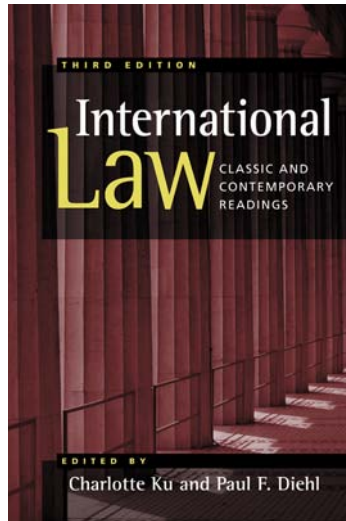
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International Law as Operating and Normative Systems: An Overview

Charlotte Ku and Paul F. Diehl

THE END OF THE COLD WAR IN 1989 HERALDED THE ADVENT of a new international order including a renewed emphasis and concern with international law. The US president at the time, George H. W. Bush, and others identified international relations "governed by the rule of law" as the defining feature of the emerging world order. Yet acts of genocide in Bosnia and Rwanda, together with the failure of the United Nations (UN) to meet renewed expectations, have left us with a world in which rules and norms are not always clearly defined or carefully observed.

In this collection, we consider international law from a fresh perspective, seeking to move beyond esoteric descriptions of the law prevalent in scholarly legal treatments, by examining international law's influence on political behavior, something largely ignored in standard analyses of international relations. There are several unique features of this effort. First, this book is perhaps the only collection that focuses on the politics of international law and does so by covering the main topics of the subject (e.g., sources, participants, courts, dispute settlement, jurisdiction, and sovereignty). Second, it is contemporary, reflecting the major changes in international relations after the Cold War and covering emerging topics in the subject such as human rights and the environment. Third, it attempts to draw a bridge between the purely legal and purely political consideration of public international law. Finally, this book offers an organizational scheme for considering international law, drawing the distinction between elements of international law that function as an operating system for international relations (e.g., courts, jurisdiction, etc.) and those that present a normative system that seeks to direct behavior in the international system (e.g., human rights, environmental prescriptions).

We begin by addressing the most basic of questions: What is international law? We then move to develop our conception of international law as a dual system for regulating interactions, both generally and within specific areas.

What Is International Law?

The basic question that we ask here—What is international law?—is straightforward enough, and it seems simple enough to answer. After all, we have a general image of what the *law* is, and the meaning of the word *international* seems self-evident. Yet when we put the two words together, we find ourselves faced with other questions that stem from our understanding of their meanings. In Western democracies, the word *law* immediately conjures up images of legislatures, police, and courts that create law, enforce it, and punish those who violate it. *International* brings up images not only of the United Nations but also of wide-ranging global differences—economic, cultural, and political. How can these two images come together? How can one imagine a structured and developed legal system functioning in a political environment that is diffuse, disparate, unregulated, and conventionally described as anarchic?

The basic question "What is international law?" embodies several other questions that need to be answered in order to understand what we are examining: (1) What does international law do? (2) How does it work? (3) Is it effective in what it does? And ultimately (4) What can we expect from it?

The first three questions necessarily deal with the diffusion and lack of regulation that exist in a political system consisting of multiple sovereign actors. As the principal possessors of coercive means in international relations, states seem to have their own exclusive recourse to the resolution of disputes. How can states be restrained? What can possibly modify their behavior? Yet behavior is restrained, and anarchy is not always the dominant mode of international politics. States also do not have a monopoly on international intercourse. International organizations, nongovernmental organizations (NGOs), multinational corporations, and even private individuals have come to play an increasing role in international relations, and accordingly international legal rules have evolved to engage these new actors.

This leads to the last of the four questions: If international law is a factor in state behavior, then what can we expect it to do? First, we expect it to facilitate and to support the daily business of international relations and politics. It does so principally by allocating decisionmaking power within the international system, thereby providing an alternative to unregulated competition. The structure and process of international law prevent the pursuit of multiple national or private interests from dissolving into anarchy. It also allows for the coexistence of multiple political units and their interaction. It provides a framework for the international system to *operate* effectively. Second, international law advances particular values—the regulation of the use of force, the protection of individual rights, and the management of the commons are prominent examples of such values. In this area, international law promotes the creation of a *normative* consensus on international behavior.

The Dual Character of International Law

International law provides both an operating system and a normative system for international relations. Conceptualizing international law as an operating system considers, in a broad sense, how it sets the general procedures and institutions for the conduct of international relations. As an operating system, international law provides the framework for establishing rules and norms, outlines the parameters of interaction, and provides the procedures and forums for resolving disputes among those taking part in these interactions. In contrast, international law as a normative system provides direction for international relations by identifying the substantive values and goals to be pursued. If the operating system designates the "structures" (in a loose sense) that help channel international politics, then the normative element gives form to the aspirations and values of the participants of the system. As a normative system, law is a product of the structures and processes that make up the operating system. The operating system is based on state consensus as expressed through widespread practice over time; the normative system must build a base of support for each if its undertakings. As an operating system, international law adopts a few of the functions that constitutions perform in some domestic legal systems by setting out the consensus of its constituent actors (states) on distribution of authority, responsibilities in governing, and the units that will carry out specific functions. We chose the word *operating* as one would conceive of a computer's operating system. It is the basic platform upon which a system will operate. When a computer's operating system (e.g., Microsoft Windows) functions to allow the use of specific word-processing programs, spreadsheets, and communications software, there is little direct consideration given to that system by the user. Similarly, the operating system of international law provides the signals and commands that make multiple functions and modes possible and when functioning often requires little conscious effort. As a normative system, international law takes on a principally legislative character by mandating particular values and directing specific changes in state behavior.

Below we outline our conceptions of the operating and normative systems and discuss their similarities and differences with related conceptions. We also briefly identify some trends in the evolution of the two systems. Integrated into these analyses are descriptions of the remaining chapters in the collection.

Operating System

The dual character of international law results from its Westphalian legacy in which law functions between, rather than above, states and in which the state carries out the legislative, judicial, and executive functions that in domestic

legal systems are frequently assigned by constitutions to separate institutions. Constitutions also provide legal capacity by allocating power and by recognizing rights and duties. Constitutions further condition the environment in which power is to be used and rights and duties to be exercised.

In order for the operating system to maintain vibrancy and resiliency, and to assure the stability necessary for orderly behavior, it must provide for a dynamic normative system that facilitates the competition of values, views, and actors. It does so by applying the constitutional functions as described above when including new actors, new issues, new structures, and new norms. Who, for example, are the authorized decisionmakers in international law? Whose actions can bind not only the parties involved but also others? How do we know that an authoritative decision has taken place? When does the resolution of a conflict or a dispute give rise to new law? These are the questions that the operating system answers. Note, in particular, that the operating system may be associated with formal structures, but not all operating system elements are institutional. For example, the Vienna Convention on Treaties entails no institutional mechanisms, but it does specify various operational rules about treaties and therefore the parameters of lawmaking.

The operating system has a number of dimensions or components that are typically covered in international law textbooks but largely unconnected to one another. Some of the primary components include:

1. Sources of Law: These include the system rules for defining the process through which law is formed, the criteria for determining when legal obligations exist, and which actors are bound (or not) by that law. This element of the operating system also specifies a hierarchy of different legal sources. For example, the operating system defines whether UN resolutions are legally binding (generally not) and what role they play in the legal process (possible evidence of customary law).

2. Actors: This dimension includes determining which actors are eligible to have rights and obligations under the law. The operating system also determines how and the degree to which those actors might exercise those rights internationally. For example, individuals and multinational corporations may enjoy certain international legal protections, but those rights might be asserted in international forums only by their home states.

3. Jurisdiction: These rules define the rights of actors and institutions to deal with legal problems and violations. An important element is defining what problems or situations will be handled through national legal systems as opposed to international forums. For example, the 1985 Convention on Torture allows states to prosecute perpetrators in their custody, regardless of the location of the offense and the nationality of the perpetrator or victim, affirming the principle of universal jurisdiction.

4. Courts or Institutions: These elements create forums and accompanying rules under which international legal disputes might be heard or decisions enforced. Thus, for example, the Statute of the International Court of Justice provides for the creation of the institution, sets general rules of decisionmaking, identifies the processes and scope under which cases are heard, specifies the composition of the court, and details decisionmaking procedures (to name a few).

Our conception of an operating system clearly overlaps with some prior formulations but is different in some fundamental ways. Regime theory[1] refers to decisionmaking procedures as practices for making and implementing collective choice, similar to "regulative norms,"[2] that lessen transaction costs of collective action. Although these may be encompassed by the international law operating system, our conception of the latter is broader. The operating system is not necessarily issue-specific but may deal equally well (or poorly) with multiple issues—note that the International Court of Justice may adjudicate disputes involving airspace as well as war crimes. Regime decisionmaking procedures are also thought to reflect norms, rules, and principles without much independent standing.

H. L. A. Hart developed the notion of "secondary rules" to refer to the ways in which primary rules might be "conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[3] This comports in many ways with our conception of an international legal operating system. Yet Hart views secondary rules (his choice of the term *secondary* is illuminating) as "parasitic" to the primary ones. This suggests that secondary rules follow in time the development of primary rules, especially in primitive legal systems (which international law is sometimes compared to). Furthermore, secondary rules are believed to service normative ones, solving the problems of uncertainty, stasis, and inefficiency inherently found with normative rules.

Our conception of an international legal operating system is somewhat different. For us, the operating system is usually independent of any single norm or regime and, therefore, is greater than the sum of any parts derived from individual norms and regimes. The operating system in many cases, past its origin point, may precede the development of parts of the normative system rather than merely reacting to it. In this conception, the operating system is not a mere servant to the normative system, but the former can actually shape the development of the latter. For example, established rules on jurisdiction may restrict the development of new normative rules on what kinds of behaviors might be labeled as international crimes. Neither is the operating system as reflective of the normative system as Hart implies it is. The operating system may develop some of its configurations autonomously from specific norms, thereby serving political as well as legal

needs (e.g., the creation of an international organization that also performs monitoring functions). In the relatively anarchic world of international relations, we argue that this is more likely than in the domestic legal systems on which Hart primarily based his analysis.

Indeed, this may explain why, in many cases, the operating system for international law is far more developed than its normative counterpart; for example, we have extensive rules and agreements on treaties but relatively few dealing with the use of force. Furthermore, the operating system has a greater stickiness than might be implied in Hart's formulations. The operating system may be more resistant to change and not always responsive to alterations in the normative system or the primary rules. This is not merely a matter of moving from a primitive legal system to a more advanced one (as Hart would argue) but rather considering how adaptive the two systems are to each other. Finally, our formulation sees effective norm development as dependent on the operating system or the structural dimension. A failure to understand this dependence may stall or obstruct a norm's effectiveness. Again, the metaphor of a computer's operating system may be useful, as the failure of the operating system to support adequately a software application will slow down or render inoperable features of that application for the user.

The evolution of the operating system in all of the areas enumerated above has been toward expansion—in the number of actors, in the forms of decisionmaking, and in the forums and modes of implementation. Although international law remains principally a body of rules and practices to regulate state behavior in the conduct of interstate relations, much of international law now also regulates the conduct of governments and the behavior of individuals within states and may address issues that require ongoing transnational cooperation. Human rights law is an example of the normative system regulating behavior within states. Such human rights law, however, may configure elements of the operating system in that the human rights granted may convey legal personality to individuals, thereby rendering them capable of holding or exercising legal rights. Activities such as the follow-up conferences to the Helsinki Accords or the periodic meetings of the parties to the Framework Convention on Climate Change are specific examples of the operating system designed to give such norms effect.

Because international law lacks the institutional trappings and hierarchical character of domestic law, its organizing principles and how they work are important to identify. These are the elements of the operating system. First, one must know where to find international law. Because the international legal system has no single legislative body, it is sometimes difficult knowing where to start. One begins with state behavior and examines the sources of international law to interpret state behavior and to identify when such behavior takes on an obligatory character. The sources of international law further provide guidance on how to find the substance of inter-

national law by highlighting key moments in the lawmaking process. Sources help us to locate the products of the lawmaking process by identifying its form. For example, international agreements are generally to be found in written texts. Law created by custom, however, will require locating patterns of state behavior over time and assessing whether this behavior is compelled by any sense of legal obligation.

There has been an expansion in the forms of law. This has led to thinking about law as a continuum "ranging from the traditional international legal forms to soft law instruments."[4] This continuum includes resolutions of the UN General Assembly, standards of private organizations such as the International Standards Organization, as well as codes of conduct developed in international organizations. An example is the adoption of a code of conduct on the distribution and use of pesticides by the Food and Agriculture Organization in 1985. The concept of a continuum is useful because these modes are likely not to operate in isolation but rather interact with and build on each other. Chapter 2, the first selection in Part 1 of this book, contrasts hard and soft international law. States may choose one form of law over the other, and Kenneth Abbott and Duncan Snidal explore some of the rationales for this; for example, hard law provides for more credible commitments than softer legal instruments. The two scholars thus reveal that international law is not inherently weak or strong, nor necessarily precise or imprecise. Rather, the configuration of law in the international system comes from explicit choice, and, whatever the form, advantages and disadvantages are attendant to it.

Customary practice and conventions work in tandem to regulate state behavior. The law applicable to the continental shelf is an example of this, as customary practice became codified in a subsequent convention. Traditional conceptions of international law sources have focused on custom and treaty-making between states. Framed in this way, traditional custom may be seen in steep decline relative to the international community of states' preference for more formal arrangements. In Chapter 3, Anthea Roberts challenges that notion by reconceptualizing the bases of customary behavior. She contends that even though traditional views of custom emphasized consistent state practice over time, we now analyze key statements of leaders and decisionmakers rather than state action. Thus, the balance of modern custom has shifted away from state practice and more toward the perception of a legal obligation *(opinio juris)* by those partaking in international relations activities. Such a conception provides for more numerous instances of customary law and lessens its decline in importance vis-à-vis formal international agreements.

There are many sources of hard international law, but at the top of the hierarchy is *jus cogens* or preemptory norms. No international law can violate or supersede such standards, but it is not clear what those norms are or

how they come about. In Chapter 4, Dinah Shelton discusses the historical development of these elusive standards, such as the prohibition against slavery. She also covers how they are interpreted and what role they might play in the future of international law.

A second element of the international law operating system includes the participants or actors in the process who create the law and are the subjects of its precepts. This is central because international law is a system that relies largely on self-regulation by the system's units. The number of participants will affect the character of the political process of creating law by determining the number of interests that need to be taken into account, the available resources, and the modes of implementation. The substance of international law will reflect the participants' interests and capacities in the international system. Issues of how, where, and with what effect the law is implemented depend on the economic, political, and other circumstances of participants.

In part because of the expansion in the forms of international law, participants in the international legal process today include more than 190 states and governments, international institutions created by states, and elements of the private sector—multinational corporations and financial institutions, networks of individuals, and NGOs. Not all participants carry the same level of authority in the legal process, but they are recognized either in fact or in practice as playing a role in identifying and promoting particular values.[5] The partnership struck between NGOs and the government of Canada to promote a convention to ban the use of antipersonnel landmines is an example of the collaboration that various actors have undertaken in the international legal process, thereby giving new actors a role in the lawmaking and the subsequent implementation process.

It is in the steady increase in both the number and type of participants in the international legal process that we see some of the most tangible changes in international law. This increase is a critical change, because who is included and who is allowed a voice in the process both affects how the law operates and determines the content of the law. As Jose Alvarez illustrates in detail in Chapter 5, the prevalence of states negotiating bilateral treaties has been replaced with multilateral negotiating forums, often under the auspices of international organizations and involving significant input from NGOs and various other private actors that comprise part of civil society.

The increase in participants began with the end of the Thirty Years' War in 1648 and the acceptance of participation by Protestant princes within the same system as Catholic princes in Europe. The next increase resulted from the empire-building activities of the European powers, which brought non-European states into the international legal process. Most recently, the move has been to include individuals and NGOs, including multinational corporations, into the process. Each addition of participants increases the complexi-

ty of the lawmaking process. At the same time, many of the issues in international law today require multiple layers of cooperative and coordinated activity crossing public and private sectors for effective regulation and implementation. Complexity, therefore, cannot be avoided and, indeed, may now be required for the effective operation of international law.

Among the most dramatic changes in international law over the past few decades has been the emergence of NGOs as central players in the legal process. In Chapter 6, Steve Charnovitz details the legal status of NGOs and how they have changed international law. Most international organizations now include provisions for participation of NGOs. The author stops short of claiming that an international duty to consult such entities exists, but he suggests that the international community is moving in that direction.

A third element of the international law operating system is the process under which law is implemented and actors comply (or fail to do so) with international law. Although the number of international agreements has increased and the requirements are more elaborated, surprisingly little is known about what induces compliance with international obligations. The absence of an international police force and other traditional coercive mechanisms for compliance add to the puzzle of why states obey international law (and, in fact, we know they do so most of the time). Beth Simmons (Chapter 7) reviews different explanations for state compliance. These include those based on realpolitik formulations, those based on rationalist ideas, and those that emphasize more normative and less utilitarian considerations. In various ways, she finds each of these lacking in understanding the puzzle.

The enforcement of international law through the operating system is not always efficient or effective. Rather, ensuring compliance often requires reliance on mechanisms outside the formal operating system. Charlotte Ku and Paul Diehl (Chapter 8) identify four processes by which gaps in the operating system are filled: (1) NGOs and transnational networks, (2) internalization of international law, (3) domestic legal and political processes, and (4) soft law mechanisms. Although these mechanisms do not ensure a fully functioning legal system, they are in some cases superior to operating system components designed to fulfill the same functions.

Another aspect of creating an effective international law operating system is determining how remedies for wrongful acts or grievances will work. This requires an understanding of what the wrongful act or grievance is, who the aggrieved party is, who might be responsible for the act, and the applicable law for the situation. The applicable law will then determine the relevant forum or procedure for examining the grievance and will identify available remedies. Among the most critical of those operating rules concern jurisdiction: Which states are allowed to use their own national courts

to prosecute individuals for which crimes? Perhaps the most controversial jurisdiction principle has been universal jurisdiction, which allows any state the right to try the accused, provided they have that person in custody. This principle was central in Spanish attempts to try General Augusto Pinochet for actions he took in Chile, as well as aborted attempts to prosecute Israeli prime minister Ariel Sharon in Belgium for acts committed in Lebanon. The Princeton Project (Chapter 9) has developed a set of guidelines, presented here, for how universal jurisdiction should be applied. This commentary on new principles for universal jurisdiction reveals the various disputes and competing interests that arise in constructing such operating system rules.

The forums and modes for implementation have also expanded. Although international law still relies on domestic legal and political structures for implementation, the international community has also created new international institutions and recognized transnational legal processes that have over time become recognized forums in which to engage in decision-making, interpretation, and recently even the prosecution of individuals on the basis of violations of international law.[6] Not only do representatives of states continue to meet to make law; they also meet routinely in international settings to ensure its implementation and compliance (e.g., meetings of UN organs or the Conference on Security and Cooperation in Europe follow-up meetings after the Helsinki Accords in 1975).

Two developments are particularly noteworthy. One is the emerging systematic understanding of how international norms or rules of behavior are actually being given effect and implemented through domestic legal systems. The other is the creation of international courts adding to the institutional underpinnings of international law. Both developments are additions to the capacity of the international legal system to meet its objectives.

The first development is evidenced by studies on transnational law, transnational legal process, and transnational networks. In his classic *Transnational Law,* Philip Jessup coined this term in order to capture the "complex interrelated world community which may be described as beginning with the individual and reaching up to the so-called 'family of nations' or 'society of states.'"[7] Harold Hongju Koh puts a contemporary gloss on this by describing a

> transnational legal process . . . whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law declaring fora, then internalized into a nation's domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.[8]

Anne-Marie Slaughter adds a political-science dimension to her contribution by recognizing a diffusion of state power and functions that makes

possible the emergence of transnational networks of government regulators and administrators who can set standards and effectively make law.[9]

On the international level, the most notable operating system development is the creation of international courts to interpret and to implement the law. Standing permanent courts with impartial judges and a published jurisprudence are important building blocks in any legal system as means for not only settling disputes but also interpreting and elaborating existing law. When the decisions made are published, state behavior can be modified by setting a range of acceptable conduct and interpretation in particular areas. One of the most significant developments in building international legal institutions was the establishment of the International Court of Justice, a permanent tribunal with judges elected to serve in their individual capacities to settle disputes between states. Nevertheless, the nearly ninety years of the operation of the Permanent Court of International Justice and its successor (the International Court of Justice) demonstrate that the existence of a standing court has replaced neither the use of force nor other non-judicial methods to resolve international disputes.

Since the early 1990s, however, there has been an explosion of new international legal institutions and the increased use of extant courts. Rosalyn Higgins, a justice on the International Court of Justice (ICJ), reviews some of the potential problems that arise when multiple tribunals—for example the International Criminal Court and the ICJ—deal with the same issues or aspects of the same cases (Chapter 10). She then reviews several solutions to the difficulties that arise. Following Higgins's contribution, we include examinations of two of the most prominent and controversial judicial mechanisms: the World Trade Organization (WTO) dispute resolution process and the International Criminal Court (ICC).

A key element of the General Agreement on Tariffs and Trade, the landmark economic treaty concluded in April 1994, was the establishment of a WTO that has legal authority to monitor and adjudicate trade disputes between states. Pascal Lamy (Chapter 11) first describes what makes the WTO mechanism unique and a break with past arrangements under the General Agreement on Tariffs and Trade (GATT) system. He then discusses how the WTO legal system is linked with those of other international organizations. The ICC is one of the few international courts in which individuals, rather than states, may be parties to the proceedings. In Chapter 12, Philippe Kirsch provides some of the background for the ICC as well as identifying some of the key provisions of the ICC statute. It becomes clear that many of the provisions reflect the necessity of finding a middle ground between the ideals of punishing international crimes and the realities of diplomatic compromise between states with different political and cultural agendas. The effectiveness of the ICC is something that will have to be evaluated in future decades, but

its mere creation represents a major divergence from past international legal practice.

Overall, the operating system provides the framework within which international law is created and implemented, and it defines the roles of different actors and also provides mechanisms for the protection of rights and the settlement of disputes. The materials presented in Part 1 demonstrate that even though key elements of the operating system are settled, they do not remain static. Pressures for change are ongoing and will succeed when changes are required to keep the operating system appropriate and effective in supporting contemporary international politics. The elements of the operating system must continuously pass a test of functionality: if they fail to perform, the elements will be replaced by others that serve the broad and general interest of allocating power and of ensuring reasonable order in the conduct of international relations. Competing demands and interests among the operating elements help to identify areas in which adjustments are needed so that when the political circumstances dictate change, international law is ready to respond.

The Normative System

We choose the word *normative* to describe the directive aspects of international law because this area of law functions to create norms out of particular values or policies. Using a different set of analogies, we could imagine normative processes as quasilegislative in character by mandating particular values and directing specific changes in state and other actors' behaviors. Use of the terms *norm* and *norms* abound in the study of international relations, and it is not always clear what meaning is conveyed by a particular construction. In the regimes literature, norms and principles (e.g., orthodox versus embedded liberalism in trade) are broader philosophies of how states and other actors should behave. Although they tend to be issue-specific (e.g., trade, human rights), regime norms are not generally defined at the micro level (e.g., precise changes in rules governing certain human rights violations). In this sense, they are similar to what Michael Barnett refers to as "constitutive norms."[10] Our conception of norms in one sense is narrower and more precise. We focus only on normative elements that have a legally binding character, analogous to the idea of rules in the regime literature. Because we are interested in the international legal system, we are not concerned with acts of "comity," which might be appropriate subjects for a broader inquiry of international norms. In another sense, we have a deeper conception for norms that goes beyond broad general principles to include specific elements about behavior. That is, our normative system is concerned with particular prescriptions and proscriptions, such as limitations on child labor.

Our conception of a normative system is similar to what Hart defines as primary rules that impose duties on actors to perform or abstain from actions.[11] But there is an important difference: Hart sees primary rules as the basic building blocks of a legal system, logically and naturally coming before the development of what we define as the operating system components. For Hart, a primitive legal system can be one with developed rules but without substantial structures to interpret or enforce those rules. We see a more developed international legal system in which norms may exist without specific reference to the operating system yet cannot function without using the operating system's mechanisms. Nevertheless, the normative system may remain somewhat autonomous from the operating system and may even lag behind in its development.

In defining the normative system, the participants in the international legal process engage in a political and legislative exercise that defines the substance and scope of the law. Normative change may occur slowly with evolution of customary practices, a traditional source of international law. Yet in recent historical periods, normative change has been precipitated by new treaties (e.g., the Nuclear Non-Proliferation Treaty) or by a series of actions by international organizations (e.g., the activities of the first team of UN weapons inspectors in Iraq).[12] Nevertheless, the establishment of international legal norms still is less precise and structured than in domestic legal systems where formal deliberative bodies enact legislation.

In contrast to the general terms associated with topics of the operating system (e.g., jurisdiction or actors), the topics of the normative system are issue-specific, and many components of the system refer to subtopics within issue areas (e.g., the status of women within the broader topic area of human rights). Many of these issues have long been on the agenda of international law. Proscriptions on the use of military force have their roots in natural law and early Christian teachings on just war. Many normative rules concerning the law of the sea (e.g., seizure of commercial vessels during wartime) also have long pedigrees in customary practice. Yet recent trends in the evolution of the normative system represent expansions in its scope and depth. Some current issue areas of international legal concern, most notably with respect to human rights and the environment, have developed almost exclusively during the latter half of the twentieth century. Furthermore, within issue areas, legal norms have sought to regulate a wider range of behaviors; for example, international law on the environment has evolved beyond simple concerns of riparian states to include concerns with ozone depletion, water pollution, and other problems.

The range of agreement on the normative content in particular issue areas varies and is not necessarily a function of the length of time that the issue has been on the international legal agenda. For example, in the area of the use of force, the United Nations Charter prohibits its use other than in

self-defense. Yet empirically, the use of force in international relations has not been eliminated. Nevertheless, efforts to regulate its use have changed state behavior at least in its initial use and in the response of others to its use. Despite the legal standards and the institutional structures to support these standards, debates continue on the appropriate levels of force and on the appropriate responses to situations that may require stepping over the principle of nonintervention in the internal affairs of states. In the area of human rights, the normative content of human rights is unsettled.[13] The United States, for example, promotes items included in the Covenant on Political and Civil Rights but eschews involvement with the Covenant on Economic and Social Rights. The place of democracy in the panoply of rights is not automatically accepted. Debates surrounding the universal versus culture-based character of human rights are another indication that the normative content of international human rights law is still under development.

In summary, the normative system of international law defines the acceptable standards for behavior in the international system. These are issue-specific prescriptions and proscriptions, with some variation in the consensus surrounding them among the international community of states. The normative system of international law has undergone explosive growth, in scope and specificity, over the past half-century or so, although it remains underdeveloped relative to its domestic counterparts.[14]

The effectiveness of the normative system, however, depends largely on the operating system—the mechanisms and processes that are designed to ensure orderly compliance with norms—and they will change if problems signal a need for change. The normative system may facilitate compliance in isolation from the operating system by "compliance pull."[15] Compliance pull is induced through legitimacy, which is powered by the quality of the rule and/or the rulemaking institution. Still, "primary rules, if they lack adherence to a system of validating secondary rules, are mere *ad hoc* reciprocal arrangements."[16] Compliance pull may exist under such circumstances, but it will be considerably weaker than if secondary rules (related to the operating system) are present. Note that we are speaking of more than compliance concerns in dealing with norms. Regime theory has typically assumed that it is the desire to improve the efficiency of interstate interactions (e.g., reduce transaction costs) that drives the adoption of normative rules. Our view is that states adopt normative rules in order largely to promote shared values in the international system. Rule adoption and institution creation (largely operating system changes) may be helpful in implementation and in reducing transaction costs, but they are not a necessary element or purpose of normative change.

Prominent activity in the normative system of international law has been in the regulation of the use of force, the protection of human rights, the

protection of the environment, and the management of the commons. In each of the four normative areas we have selected, the political bases of international law can be seen as states struggle to ensure the goals of peace, justice, and prosperity while not fully negating the rights accorded to them under national sovereignty. We find that many of these areas require the balancing or reconciling of inconsistencies as international law searches for generally applicable standards against a background of economic disparity and historic exploitation that stemmed from political and technological weakness.

The oldest segment of the international normative system concerns the use of force. Paradoxically, at the same time it is the most developed and also the least restrictive on state behavior. Carsten Stahn (Chapter 13) notes that the traditional distinction between states of war and states of peace, which have defined international law for centuries, no longer apply well to modern problems. In an era of peacebuilding and other involvement in the aftermath of war, the author outlines a series of principles for "postconflict" law, a situation not envisioned in traditional legal distinctions between war and peace. Terrorist attacks provide another significant challenge for international legal prescriptions given that such attacks are generally precipitated by individuals or groups (not states) and do not take traditional military forms. Accordingly, most international legal provisions for dealing with aggression seem to fit poorly with this form of conflict. In Chapter 14, M. Cherif Bassiouni reviews the current legal provisions for dealing with terrorism, revealing a broader set of laws than might be first evident, but still indicating an underdeveloped normative system in this area.

The piercing of the shell of state sovereignty is perhaps most dramatic in the area of human rights, where states no longer have full rein over actions within their borders. Thomas Buergenthal (Chapter 15) provides a historical overview of human rights norms and the institutions that are designed to ensure their observance. Unlike the international law on the use of force, which has a long history, human rights provisions in international law are far more recent, dating primarily to the UN Charter and thereafter.

The protection of human rights involves more than setting standards that states and other actors must meet. International law also conditions the actions of states and international organizations that wish to redress violations of human rights law. Traditional notions of state sovereignty limited the ability of others to intervene directly in the affairs of states, at least without the permission of that host state. Yet there has been a slow erosion of support for this concept of so-called hard-shell sovereignty. One key idea is that states or collectivities of states may have the right to intervene in other countries in order to respond to emergencies. Christopher Joyner (Chapter 16) examines "the responsibility to protect" and how this principle comports with legal provisions on humanitarian intervention, UN Charter

rules on the use of force, sovereignty, and human rights norms such as that against genocide. The responsibility to protect has been cited by advocates of intervention in Darfur to stop mass killings and in Myanmar to ensure relief supplies in the aftermath of natural disaster.

Environmental protection is relatively new on the international legal agenda. Yet since the 1980s, states have increasingly regulated their own behavior by signing agreements establishing strict environmental standards and controls. The Rio summit of 1992 is only a recent example of how prominent the environmental issue has become in international relations. In Chapter 17, Ronald Mitchell identifies and describes the characteristics of the thousands of bilateral and multilateral treaties that deal with environmental issues. He also offers a tentative evaluation of their effectiveness, with an eye to determining the components that make for success in global environmental protection. Catherine Tinker (Chapter 18) adds a post-Rio overview in the area of protection of biological diversity. The environmental area challenges international law to address changing situations that render regulation through specific legal standards and obligations difficult. This has moved lawmaking into creating frameworks for cooperation and coordination in addition to creating specific legal obligations.

Closely related to international environmental efforts are normative constraints designed to preserve the benefits and riches of the global commons for all. Global commons law has generally developed in accordance with technological development and need; thus, the law of the sea is the oldest segment of law in this issue area, but even there issues such as seabed mining have appeared only recently. In Chapter 19, Bernard Oxman looks at the evolution of the law of the sea, from its early days to the present. He devotes significant attention to new innovations, such as the creation of the Exclusive Econonic Zone (EEZ). He also raises some doubts about the stability of the current arrangements as states seek to expand their territorial control and new mineral resources are discovered off shore. David Tan (Chapter 20) provides a summary of current international law on space as well as some proposals for how that law might further develop.

In Part 3, the concluding section of this book, we take a look into the future. The development of the internet and cyberspace raises dramatically new and different questions for international law, which is traditionally based on state sovereignty over conventional land, sea, and air spaces. Who can and should regulate cyberspace? Mathias Reimann, in Chapter 21, reviews a case against *Yahoo* in a French court and identifies several "first generation" issues associated with regulating cyberspace, namely who should regulate it, whether existing conflict of laws provisions can handle such concerns, and how free speech might be protected in this new environment. He then notes that technology development has created a new set of concerns that will need to be addressed in the future. One might speculate

that cyberspace will be one of the most prominent areas for international legal development in the coming decades, although it will be difficult for international law to keep up with technological advances.

Finally, Anne-Marie Slaughter and William Burke-White peek into the future and see the dividing lines between domestic and international law eroding. They see three functions of international law vis-à-vis domestic law as essential to promoting the normative values of the international community: strengthening domestic institutions, backstopping them, and compelling them to act. The authors regard the European Union as the prototype for how these arrangements might be achieved.

To address new challenges effectively will require adjustments to the operating system. Like much else in contemporary life, international law will be expected to make more complicated adjustments more rapidly and more frequently than at any other period of its development. This makes the study of this subject a richly rewarding exercise. It makes the practice of international law a daunting, but richly creative, exercise as new legal ground is broken to address changing circumstances. It further affirms the symbiotic relationship between the operating system and the normative system in which the capacity to sustain the operating system will increasingly depend on how well the international community can address its normative concerns.

Notes

1. Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in *International Regimes,* edited by Stephen Krasner (Ithaca, NY: Cornell University Press, 1982), pp. 1–2.

2. Michael Barnett, "The United Nations and Global Security: The Norm Is Mightier than the Sword," *Ethics and International Affairs* 9 (1995): 37–54.

3. H.L.A. Hart, *The Concept of Law,* 2nd ed. (Oxford, UK: Clarendon, 1994), p. 94.

4. Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *International and Comparative Law Quarterly* 38 (1989): 850–866; see also Prosper Weil, "Toward Relative Normativity in International Law," *American Journal of International Law* 77 (1983): 413–442.

5. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, UK: Clarendon, 1994).

6. See Charlotte Ku and Christopher Borgen, "American Lawyers and International Competence," *Dickinson Journal of International Law* 18(3) (2000).

7. Philip C. Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956), p. 1.

8. Harold Hongju Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181.

9. Anne Marie Slaughter, "The Real World Order," *Foreign Affairs* 76 (1997): 103.

10. Barnett, "The United Nations and Global Security."

11. Hart, *The Concept of Law*.

12. We do, of course, recognize that even with the trend toward treaties as the primary source of new international law, many treaties in recent decades have largely codified existing customary practice (e.g., significant portions of the Law of the Sea Conventions).

13. See, for example, Louis Henkin and John Lawrence Hargrove, *Human Rights: An Agenda for the Next Century* (Washington, DC: American Society of International Law, 1994).

14. See Christian Wiktor, *Multilateral Treaty Calendar, 1648–1995* (Dordrecht, Netherlands: Martinus Nijhoff, 1998), which contains 6,000 treaties.

15. Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

16. Ibid., p. 184.