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International Law  
in World Politics:  
An Introduction

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# 1

## The Rules-Based International Order

One of the defining features of global governance over the past century has been that it has been “rules-based.” Rules come in a variety of types—they may, for example, be moral, ethical, or legal. During the contemporary era, the rules-based international order has had at its core a system of international law. The system of international law was by no means new when the United States became a world power, but the enormous expansion of international law, both qualitatively and quantitatively and of a rules-based approach to the conduct of foreign relations has been very influenced by US leadership. The architecture of global governance has never remained static and the system of international law is now complex and far-reaching such that it has a dynamic of its own. It is not possible to understand world politics without some knowledge and understanding of international law.

### **The Entwining of International Law and World Politics**

A political system can be defined as “any persistent pattern of human relationships that involves, to a significant extent, control, influence, power, or authority.”<sup>1</sup> 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. What we find when we analyze the operation of a political system, is 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.<sup>2</sup> 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. Law—a system of rules, principles, and concepts pertaining to how relationships should be conducted within a political unit—is in many systems important in deciding who can do what and who gets what in that unit.

This may be easier to understand if a comparison is made with the domestic situation in many countries. 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 can donate to political parties and under what conditions, whether indigenous people have the same rights to land as other members of society, or even with which adult a child is to live. 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 be to the benefit of exporting countries more than 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. International law operates within the political milieu but international law is to some extent distinct from that political system. A political term such as *sovereignty*, *state*, or *genocide* may also be used within the system of international law but with a different meaning.

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.

### **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, or what is termed *municipal*, law and international law.

### *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 the question that, 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 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 which 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. The earliest known treaty dates from around 3000 B.C., preserved on a border stone between Lagash and Umma in Mesopotamia.<sup>3</sup> The important contemporary principle of *pacta sunt servanda*—that 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.<sup>4</sup> And although 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.

A treaty is usually dated from the year of agreement on the text. This may differ significantly from the date on which the treaty becomes law and the parties are bound by its terms. The text of the Third United Nations Convention on the Law of the Sea, for example, was agreed in 1982, but the convention did not receive the necessary support to enter into force (become law) until 1994.<sup>5</sup> The UN Charter requires members to register all new treaties with the UN Secretariat, which publishes them in the United Nations Treaty Series (UNTS).<sup>6</sup> Other useful collections include the Multilaterals Project at the Fletcher School of Law and Diplomacy at Tufts University, Massachusetts.<sup>7</sup>

A treaty is divided into articles and, within an article, into paragraphs and subparagraphs. “Article 48(4)(a)” refers to “article 48, paragraph 4,

sub-paragraph (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 entitled “protocols.”

*Bilateral treaties* are agreements 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 status of forces agreements with more than 100 countries in which its troops are stationed or operating.<sup>8</sup> These have often been controversial in the domestic politics of the host countries. There has long been popular sentiment that Japan should have primary jurisdiction in the event that crimes are committed off base by people related to the US forces; South Korea has twice revised its SOFA with the United States.<sup>9</sup> Controversially, Russian president Vladimir Putin was able to claim, on the basis of the SOFA between Ukraine and Russia relating to the stationing of the Russian Black Sea fleet in Crimea, that Russia’s Armed Forces did not enter Crimea at the time of the 2014 takeover: “they were already there!”<sup>10</sup>

Bilateral investment treaties (BITs) regulate investment by private actors of one country in another country. They protect investors from, for example, having their assets expropriated by the government of the host country. There are over 2,000 BITs, which typically include provisions on what to do in the event of a dispute. The International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank is the key dispute-settlement forum for investor-state disputes. In 2014, ICSID ordered Venezuela to pay ExxonMobil US\$1.6 billion in compensation for the 2007 nationalization of its oil projects in the country.<sup>11</sup>

*Multilateral treaties* are agreements between three or more states. Many aim for *global* participation. One particularly important function played by multilateral treaties is to act as the legal foundation of intergovernmental organizations. The rules-based international order is underpinned by a small set of cornerstone treaties. These include the Charter of the United Nations,<sup>12</sup> the Treaty on the Non-Proliferation of Nuclear Weapons,<sup>13</sup> the United Nations Convention on the Law of the Sea, the United Nations Framework Convention on Climate Change,<sup>14</sup> and the Marrakesh Agreement Establishing the World Trade Organization.<sup>15</sup> (See Figure 1.1.)

**Figure 1.1 Examples of Multilateral Treaties at a Regional and Global Level**

Selected Subject Area	Example at a Regional Level	Example at a Global Level
Human rights	African Charter on Human and Peoples' Rights	Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
International humanitarian law	Havana Convention on Maritime Neutrality	Geneva Convention VI Relative to the Treatment of Prisoners of War
Arms control	Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco)	Treaty on the Non-Proliferation of Nuclear Weapons
Trade and commercial relations	North American Free Trade Agreement	UN Convention on Contracts for the International Sale of Goods
International in criminal law	European Convention on the Suppression of Terrorism	UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
Environment	Oslo Convention on Marine Dumping	The Vienna Convention on Substances that Deplete the Ozone Layer

*Regional treaties* often complement those at a global level. There is, for example, an African treaty relating to refugees that corresponds to the *Refugee Convention* operating at a global level. In the area of trade, difficulties in negotiating new multilateral treaties at a global level has led to the growth of regional and bilateral treaties.

The term *plurilateral* is sometimes used to refer to treaties in which participation is limited by purpose, geography, or both.<sup>16</sup> The 1993 Convention for the Conservation of Southern Bluefin Tuna involves three countries active in this fishery, and others active in the fishery have since been encouraged to become parties.

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 those 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.

We will be looking in more detail at multilateral treaties and the politics surrounding them in Chapters 8 and 9.



**Customary International Law.** The second most important source of international law today is customary international law or 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.<sup>17</sup>

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 only be used as evidence of custom if the *opinio juris* component is present (i.e., that the state has been choosing to act in that way for reasons of law). To establish that a particular rule exists in customary international law, it is necessary to find evidence of both state practice and *opinio juris*.

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 the state in question to engage in a particular practice (or not to act). The US response to the terrorist attacks of September 11, 2001, and the attitude of other states to that response appears to have confirmed an evolution of customary international law to include a right to use force in self-defense against a terrorist attack (see Chapter 10, Figure 10.3).

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 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.

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 as a consequence other states may only use such airspace for navigation or other purposes 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.<sup>18</sup>

### *A Police Force to Enforce the Law?*

In addition to there not being an international legislature, another 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.<sup>19</sup> 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 states 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 the police. The police force in a domestic system primarily enforces criminal law. The bulk of the international law governing relations among states does not address the criminal behavior of states but is better compared with 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 of enforcement of international law, although when viewed as a whole, the picture may still look patchy. Individual states can attempt to ensure that other states respect the rules of international law in their mutual relations by measures of *retorsion*, unfriendly but legal acts, such as the severance of diplomatic relations, a practice that is 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*. Countermeasures are acts that would be illegal other than that they were carried out in response to an illegal act of the other party. Countermeasures must be proportional to the breach to which they were a response and may not include the use of force.<sup>20</sup>

If the 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.<sup>21</sup> 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.”

International law is on occasion enforced through the expulsion or suspension of a state from an IGO. The United Nations General Assembly suspended Libya's membership of the Human Rights Council in 2011 in response to a violent crackdown on anti-government protestors.<sup>22</sup>

One of the most important ways of ensuring compliance with multilateral treaties is to write into the treaty verification measures—ways of checking that the other states party to that treaty are complying. Verification measures may include a system of inspections or of reporting.

In recognition that noncompliance does not always stem from a lack of political will, compliance with international law is sometimes promoted through 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.<sup>23</sup>

There is increasing scope for some international law to be enforced against individuals. The International Criminal Court was established to end impunity for the most serious of international crimes and it can, for example, imprison those convicted of war crimes or crimes against humanity. The United Nations Security Council (UNSC) maintains sanctions lists of individuals and entities involved in international terrorism, on whom they may impose penalties such as asset freezes and travel bans.

National courts sometimes enforce international law. In the United States, the Torture Victim Protection Act of 1991 creates a right for victims, including aliens, of state-sponsored torture and summary execution in other countries to sue in federal courts. In New Zealand, the International Crimes and International Criminal Court Act of 2000 provides that individuals may be prosecuted in New Zealand for war crimes, crimes against humanity, and genocide regardless of the nationality or citizenship of the person accused and whether or not the alleged offense occurred in New Zealand.<sup>24</sup>

### *A Judiciary?*

Although there is no international legislature, there is a world court, situated in the Hague, Netherlands. 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 UN. The operation of the ICJ is underpinned by the principle of consent: the ICJ can only hear a contentious case between states 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 ICJ. The decision as to whether to be involved in a case before the ICJ 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 US 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 ICJ, but the Court will find that the state concerned has, in fact, given its consent. To understand how this could come about requires looking at the relevant law, which we will do in Chapter 5.

Article 38(1) of the Statute of the International Court of Justice sets out the basis on which the ICJ 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 (more usually referred to as 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) since, while 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 general statement of the sources of international law.

The reference to "civilised nations" in 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 "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."<sup>25</sup> "General principles of law" was included in the Statute of the Court in case gaps remained after the consideration of treaties and custom.<sup>26</sup> The ICJ has also drawn on general principles originating in international relations and general principles applicable to all kinds of legal relations.<sup>27</sup> The principle of good faith, for example, requires parties to deal honestly and fairly with each other.<sup>28</sup> Applied to treaties, it 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."<sup>29</sup> 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 ICJ 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 but that judicial decisions and learned writings are subordinate to the first three sources.<sup>30</sup> 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. This has been a very important function of the ICJ. Much of the detail regarding customary international law, for example, has been developed by the ICJ (see Figure 1.2).

Although the ICJ is the only international court or tribunal with general jurisdiction, there has in recent years been a proliferation of judicial and quasi-judicial bodies with subject-specific jurisdiction.<sup>31</sup> Notable is the International Criminal Court (ICC), not to be confused with the ICJ, which seeks to end impunity for the gravest crimes of concern to the international community, including genocide, war crimes, and crimes against humanity. Other significant international courts include the International Tribunal for the Law of the Sea, 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 are also regional courts and tribunals. The oldest operating in Europe is the European Court of Justice of the European Communities, which began its work in 1952 as the Court of Justice of the European Coal and Steel Community. Chapter 5 looks in more detail at the growing number of international courts and tribunals.

### *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 could be said to be that of the *rule of law*.<sup>32</sup> 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 provides 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 showing its incompatibility with the rule of law, and on that

## Figure 1.2 Customary International Law and the International Court of Justice

Article 38 of the Statute of the International Court of Justice defines custom as “evidence of a general practice accepted as law.” Although this definition is provided in the context of the sources of law to be applied by the ICJ, it is widely accepted as a general definition of custom. The definition indicates the two essential elements of custom: state practice, and *opinio juris*. *State practice* is what states do as well as what they do not do. How far from the coast, for example, does a state enforce its customs laws? *Opinio juris* is the “psychological” component of the act: the belief that the state was acting out of due regard for the law on the subject in question. The necessity to customary international law of those two factors was confirmed by the ICJ in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.<sup>1</sup>

A definition of “custom” does not, though, go far in helping an international lawyer—or judge—determine whether or not a particular rule of international custom exists. There needs to be more detailed rules and principles regarding the nature and extent of the necessary state practice. A lot of this detail has been provided in judgments of the ICJ. Publicists have also contributed to the ongoing process of its refinement. Bin Cheng, for example, proposed in 1965 that United Nations resolutions on outer space constituted “instant” international customary law, thereby suggesting that only *opinio juris* is essential to the formation of custom.<sup>2</sup> This was a quite extreme view that has not been generally accepted. Let’s take some of the other questions that might be asked in determining whether or not a particular rule of customary international law has yet crystallized and see what the ICJ has said as regards each.

### How Will We Know *Opinio Juris* When We See It?

In the *North Sea Continental Shelf Cases* of 1969 the ICJ stated:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. . . . The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.<sup>3</sup>

(continues)

### Figure 1.2 continued

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#### **How Much State Practice Is Required for the Formation of Customary International Law?**

It is possible for only two states to create a bilateral custom, but the bulk of customary international law is “general.” A rule of general customary law binds all states other than “persistent objectors,” even those states that had not participated in the formation of that rule.<sup>4</sup> In its 1950 Asylum judgment, the ICJ said that a customary rule must be “in accordance with constant and uniform usage.”<sup>5</sup> The ICJ has stated that general customary international law requires there to have been “extensive” state practice involving those states that are “specially affected”:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.<sup>6</sup>

#### **What Degree of Uniformity Must There Be in State Practice?**

In its 1986 Nicaragua judgment the Court stated:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.<sup>7</sup>

#### **With What Implications for Those Not Engaging in the Practice?**

By the “persistent objector principle,” a state that is aware of a practice with which it does not agree and protests consistently against the emergence of a rule from the very beginning will not be bound by the rule, although the objecting state cannot necessarily prevent the creation of that rule. There have not been many examples of the application of the principle. It is very difficult for a state to establish that it has been a persistent objector. The process by which custom evolves is often clear only in

*(continues)*

**Figure 1.2 continued**

retrospect, and a state will tend to deny that a custom has emerged at all rather than to acknowledge the custom but claim to be a persistent objector.<sup>8</sup> There has been considerable debate as to whether it is really possible for a state—particularly a relatively weak one—to remain indefinitely outside of law recognized by the vast majority of states.<sup>9</sup> The ICJ nevertheless appeared to recognize the persistent objector principle in the 1951 *Fisheries* case (*United Kingdom v. Norway*) when it stated that the rule in question “would appear to be inapplicable as against Norway, inasmuch as [Norway] has always opposed any attempt to apply it to the Norwegian coast.”<sup>10</sup>

**Notes**

1. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* 1996, 226, 253, para. 64.

2. Bin Cheng, “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?,” *Indian Journal of International Law* 5 (1965), 23–48.

3. *North Sea Continental Shelf, Judgment, I.C.J. Reports* 1969, 3, 45, para. 77.

4. See, generally, M. H. Mendelson, “The Formation of Customary International Law,” *Recueil des Cours* 1998 (The Hague: Martinus Nijhoff, 1999), 214ff.

5. *Asylum, Judgment, I.C.J. Reports* 1950, 266, 276.

6. *North Sea Continental Shelf, Judgment, I.C.J. Reports* 1969, 3, 43, para. 74.

7. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports* 1986, 14, 98, para. 186.

8. Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon, 1997), p. 65.

9. See, inter alia, Jonathan Charney, “The Persistent Objector Rule and the Development of Customary International Law,” *British Yearbook of International Law* 56 (1985), 1–24; T. L. Stein, “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,” *Harvard International Law Journal* 26 (1985), 457–482; and Stephen J. Toope, “Powerful but Unpersuasive? The Role of the United States of America in the Evolution of Customary International Law,” in M. Byers and G. Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 287–316.

10. *Fisheries, Judgment, I.C.J. Reports* 1951, 116, 131.

basis demand change to the law or its improved implementation. Brock Turner, a student at Stanford University, was in 2016 found guilty of three felony counts of sexual assault. The victim had been unconscious at the time of the attack. The minimum sentencing guideline for each count is two years, but the judge handed down a much lighter sentence. Public outrage



stemmed from a perception that the judge's leniency related to Turner's social position as a privileged white male student at an elite university, and hence that special treatment was being accorded an individual, contrary to the principle of equal treatment as per the rule of law. A bill was subsequently passed in California to set mandatory sentences in cases in which victims of sexual assault are unconscious.<sup>33</sup>

The ideal of the "rule of law" also exists in the system of international law.<sup>34</sup> At the 2005 World Summit, world leaders recognized "the need for universal adherence to and implementation of the rule of law at both the national and international levels."<sup>35</sup> The 2012 High-Level Meeting of the General Assembly reaffirmed its "commitment to the rule of law," regarding it as of "fundamental importance for political dialogue and cooperation among all States."<sup>36</sup> At an international level, the ideal of the rule of law gives rise to the principle of the *sovereign equality of states*.<sup>37</sup> States are the main actors in international law, and according to this fundamental principle, all states are legally equal. Just as the principle of the rule of law does not always match reality in a domestic legal system, so it does not always 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 the weight they wield in international law. 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 the sessions.<sup>38</sup> 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 Treaty itself, are "equally authentic."<sup>39</sup>

The principle of the sovereign equality of states nevertheless plays a normative role within the system of international law and informs 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 to be bound by a treaty was procured by the coercion of its representative, and a treaty is void if it has been procured by the threat or use of force. Financial assistance exists in international law as it does in some domestic systems, so as to reduce the impact of varying levels of financial means. In 1989 the UN General Assembly established the Secretary-General's Trust Fund, a system of legal aid to assist states seeking to settle disputes through the ICJ, although this is only available to states involved in cases in which the basis of jurisdiction is an ad hoc agreement. Some environmental

treaties also make provision to assist developing countries with the costs of complying with the treaty provisions, which could also be said to embody the ideal of sovereign equality.

### **Power Versus International Law**

In contrast to the idea of the rule of law at the international level is the assumption that it is only might that matters. A mainstream assumption in the study of international relations since 1945 has been 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 tended to conceptualize 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. While 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 UN.<sup>40</sup>

The empirical literature inspired by realist thought generally adopts a simplistic attitude to international law, and often, because it assumes that the law has no important role to play, leaves it out of the story altogether. Hence, the bulk of writing on what is generally regarded as having been the most serious crisis in the Cold War—the Cuban Missile Crisis—makes no mention of international law. The US 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 US 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 length to justify the actions it took 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 US secretary of state, commented in relation to the Cuban Missile Crisis that “the power, prestige and position of the US had been challenged. . . . Law

simply does not deal with such questions of ultimate power. . . . The survival of states is not a matter of law.”<sup>41</sup> 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 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 its 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.<sup>42</sup>

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, and contemporary writers including Jack Goldsmith and Eric Posner emphasize the constraints on the effective functioning of international law.<sup>43</sup> We will be better equipped to consider the complexity of the relationship between international law and world politics once we know more about how the system of international law works. The next four chapters consider the key actors in the system of international law and what they do.

## Notes

1. Robert A. Dahl, *Modern Political Analysis*, 4th ed. (Englewood Cliffs, New Jersey: Prentice-Hall, 1984), 10.
2. *Ibid.*, 31.
3. Treaty relations were more elaborate in ancient China and India. Christian L. Wiktor, *Multilateral Treaty Calendar 1648–1995* (The Hague: Martinus Nijhoff, 1998), ix.
4. *Ibid.*, ix–x.
5. 1833 United Nations Treaty Series (UNTS) 3.
6. Available at <https://treaties.un.org>.
7. Available at <http://fletcher.tufts.edu/Multilateral>.
8. International Security Advisory Board, *Report on Status of Forces Agreements* (January 16, 2015), 1. <http://www.state.gov/t/avc/isab/236234.htm>.
9. Editorial, “SOFA-Related Change Falls Short,” *The Japan Times Opinion*, July 10, 2016, available at <http://www.japantimes.co.jp>.
10. Official site of the President of Russia, “Address by President of the Russian Federation,” March 18, 2014, <http://en.kremlin.ru/events/president/news/20603>.
11. Available at <https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/07/27>.
12. 1 UNTS XVI.
13. 729 UNTS 161.
14. 1771 UNTS 107.
15. 1867 UNTS 154.
16. John Gamble, Ryan Watson, and Lauren Piera, “Ocean Regimes as Reflected in 500 Years of Multilateral Treaty-Making,” in Aldo Chircop, Ted L. McDorman, and Susan J. Rolston, eds., *The Future of Ocean Regime-Building* (Leiden: Martinus Nijhoff, 2009), 87–104, 98.
17. 500 UNTS 95.

18. Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon, 1990), 119.
19. For a defense of international law against this charge, see Mary Ellen O'Connell, *The Power and Purpose of International Law* (Oxford: Oxford University Press, 2008).
20. C. Tomuschat, "General Course on Public International Law," *Recueil des Cours* 281 (1999), 376.
21. See articles 39 to 42 of the UN Charter.
22. "Hopes of Libyan People 'Must not be Dashed' Assembly President Says, As Secretary-General Voices 'Grave Concern' at Ongoing Violence Against Civilians," GA/11050, March 1, 2011, <http://www.un.org/press/en/2011/ga11050.doc.htm>.
23. 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.
24. New Zealand Government, "International Crimes and International Criminal Court Act 2000," October 1, 2012, [www.legislation.govt.nz/act/public/2000/0026/25.0/096be8cd8097b4c6.pdf](http://www.legislation.govt.nz/act/public/2000/0026/25.0/096be8cd8097b4c6.pdf).
25. Hermann Mosler, "General Principles of Law," *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), 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), 173–185; and M. C. Bassiouni, "A Functional Approach to 'General Principles of International Law,'" *Michigan Journal of International Law* 11 (1990), 768–818.
26. Mosler, "General Principles of Law," 516.
27. Mosler, "General Principles of Law."
28. Anthony D'Amato, "Good Faith," in *Encyclopedia of Public International Law* 2 (1995), 599–601, 599.
29. *Vienna Convention on the Law of Treaties*, article 31(1).
30. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London: Routledge, 1997), 56–57.
31. For a table of international judicial, quasi-judicial, 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* 31:4, [http://www.pict-pecti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf).
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33. Niraj Chokshi, "As Brock Turner Is Set to Be Free Friday, California Bill Aims for Harsher Penalties for Sexual Assault," *The New York Times*, August 31, 2016, available at <http://www.nytimes.com>.
34. See Simon Chesterman, "An International Rule of Law?" *American Journal of Comparative Law* 2 (2008), 331–362; Ian Hurd, "The International Rule of Law: Law and the Limits of Politics," *Ethics & International Affairs* 28:1 (2014), 39–51; Kenneth J. Keith, "John Dugard Lecture—2015 The International Rule of Law," *Leiden Journal of International Law* 28 (2015), 403–417; and Robert McCorquodale, "Defining the International Rule of Law: Defying Gravity?" *International & Comparative Law Quarterly* 65:2 (2016), 277–304.

35. "2005 World Summit Outcome," UN Document A/RES/60/1, October 24, 2005, para 134, <https://www.un.org/ruleoflaw/files/2005%20World%20Summit%20Outcome.pdf>.

36. "Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels," UN Document A/RES/67/1, November 30, 2012, available at <https://documents-dds-ny.un.org>.

37. See R. P. Anand, "Sovereign Equality of States in International Law," *Recueil des Cours* 197 (1986/III), 1–228; R. A. Klein, *Sovereign Equality Among States: The History of an Idea* (Toronto: University of Toronto Press, 1974); and 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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39. Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," *EJIL* 10 (1999), 144–171, 145.

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

41. Dean Acheson, "Remarks by the Honorable Dean Acheson, Former Secretary of State," *Proceedings of the American Society of International Law* (April 25–27, 1963), 13–18, 17.

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

43. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).