

Chapter 18

International law

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Reader's Guide

This chapter introduces students to the practice of modern international law and to debates surrounding its nature and efficacy. It begins by exploring the reasons why international societies construct institutions, and why different sorts of institutions have emerged

in different historical contexts. It then considers the nature and origins of the modern institution of international law, its close connection with the practice of multilateralism, and the recent cosmopolitanization of the global legal order. After a brief discussion of the laws of war, we conclude with a survey of different theoretical approaches to international law.

Introduction: the paradox of international law

As students of International Relations, our default position is to assume that international law matters little to the cut and thrust of international politics. The power and interests of states are what matters, and law is either a servant of the powerful or an irrelevant curiosity. Widespread as this scepticism is, it is confounded by much state behaviour. If international law doesn't matter, why do states and other actors devote so much effort to negotiating new legal regimes and augmenting existing ones? Why does so much international debate revolve around the legality of state behaviour, the applicability of legal rules, and the legal obligations incumbent on states? And why is compliance with international law so high, even by domestic standards?

This chapter introduces students to the practice of modern international law and to debates surrounding its nature and efficacy. It is written primarily for students of international politics, but should also be of interest to law students curious about the political foundations of international law. Our starting point is the idea that international law is best understood as a core international institution, a set of norms, rules, and practices created by states and other actors to facilitate diverse social goals, from order and coexistence to justice and human development. It is, however, an institution with distinctive historical roots, and understanding these roots is essential to grasping its unique institutional features.

Order and institutions

Realists portray international relations as a struggle for power, a realm in which states are 'continuously preparing for, actively involved in, or recovering from organized violence in the form of war' (Morgenthau 1985: 52). While war has certainly been a recurrent feature of international life, it is a crude and deeply dysfunctional way for states to ensure their security or realize their interests. Because of this, states have devoted as much, if not more, effort to liberating themselves from the condition of war as they have to embroiling themselves in violent conflict. Creating some modicum of international order has been an abiding common interest of most states, most of the time (Bull 1977: 8).

To achieve international order, states have created international institutions. People often confuse institutions and organizations, incorrectly using the two terms interchangeably. International institutions are commonly defined as complexes of norms, rules, and practices that 'prescribe behavioral roles, constrain activity, and shape expectations' (Keohane 1989: 3). International organizations, like the United Nations, are physical entities that have staff, head offices, and letterheads. International institutions can exist without any organizational structure—the 1997 Ottawa Convention banning landmines is an institution, but there is no landmines head office. Many institutions have organizational dimensions, though. The World Trade Organization (formerly the General Agreement

on Tariffs and Trade) is an institution with a very strong organizational structure. While institutions can exist without an organizational dimension, international organizations cannot exist without an institutional framework, as their very existence presupposes a prior set of norms, rules, and principles that empower them to act and which they are charged to uphold. If states had never negotiated the Charter of the United Nations, the organization simply could not exist, let alone function.

In modern **international society**, states have created three levels of institutions (see **Box 18.1**). There are deep constitutional institutions, such as the principle of **sovereignty**, which define the terms of legitimate statehood. Without the institution of sovereignty, the world of independent states, and the international politics it engenders, would simply not exist. States have also created fundamental institutions, like international law and multilateralism, which provide the basic rules and practices that shape how states solve cooperation and coordination problems (Reus-Smit 1999: 14). These are the institutional norms, techniques, and structures that states and other actors invoke and employ when they have common ends they want to achieve or clashing interests they want to contain. Lastly, states have developed issue-specific institutions or regimes, such as the Nuclear Non-Proliferation Treaty (NPT), which enact fundamental institutional practices in particular

Box 18.1 Levels of international institutions

Constitutional institutions

Constitutional institutions comprise the primary rules and norms of international society, without which society among sovereign states could not exist. The most commonly recognized of these is the norm of sovereignty, which holds that within the state, power and authority are centralized and hierarchical, and outside the state no higher authority exists. The norm of sovereignty is supported by a range of auxiliary norms, such as the right to self-determination and the norm of non-intervention.

Fundamental institutions

Fundamental institutions rest on the foundation provided by constitutional institutions. They represent the basic norms and practices that sovereign states employ to facilitate coexistence and cooperation under conditions of international anarchy. They are the rudimentary practices states reach for when seeking to collaborate or coordinate their behaviour. Fundamental institutions have varied from one historical system of states to another,

but in the modern international system the fundamental institutional practices of contractual international law and multilateralism have been the most important.

Issue-specific institutions or 'regimes'

Issue-specific institutions or 'regimes' are the most visible or palpable of all international institutions. They are the sets of rules, norms, and **decision-making procedures** that states formulate to define who constitute legitimate actors and what constitutes legitimate action in a given domain of international life. Examples of regimes are the Nuclear Non-Proliferation Treaty, the Framework Convention on Global Climate Change, the Ottawa Convention on Anti-Personnel Landmines, and the International Covenant on Civil and Political Rights. Importantly, issue-specific institutions or regimes are concrete enactments in specific issue-areas of fundamental institutional practices, such as international law and multilateralism.

realms of inter-state relations. The NPT is a concrete expression of the practices of international law and multilateralism in the field of arms control.

We are concerned here with the middle stratum of fundamental institutions. In modern international society, a range of such institutions exists, including international law, multilateralism, bilateralism, diplomacy, and management by the great powers (Bull 1977). Since the middle of the nineteenth century, however, the first two of these have provided the basic framework for international cooperation and the pursuit of order.

Key Points

- States have strong incentives to free themselves from the insecurities of international anarchy.
- States face common coordination and collaboration problems, yet cooperation remains difficult under anarchy.
- To facilitate cooperation, states create international institutions, of which three levels exist in modern international society: constitutional institutions, fundamental institutions, and issue-specific institutions or 'regimes'.
- We are concerned with fundamental institutions, of which international law is one of the most important.

The modern institution of international law

Historical roots

The contemporary international legal system is a historical artefact. Like most present-day institutions, it bears the imprint of the revolutions in social thought and practice that from the eighteenth century onwards transformed the political landscape of Europe and then much of the world. Great thinkers such as Hugo Grotius (1583–1645) and Emerich de Vattel (1714–67) are often cast as the 'fathers' of international law, and the Treaties of Augsburg (1555), Westphalia (1648), and Utrecht (1713) are seen as landmarks in the development

of international public law. Yet, despite the importance of these historical figures and moments, the modern international legal system acquired many of its distinctive characteristics as late as the nineteenth century (see Box 18.2).

The present international system has its roots in Europe, and before the nineteenth century the vast majority of European states were monarchies. The kings and queens who ruled these states justified their power by appealing to the doctrine of divine right, to the idea that monarchs were ordained with

Box 18.2 Key constitutive legal treaties

Over the past five centuries, the nature and scope of international society has been conditioned by a series of international legal instruments that have defined the nature of legitimate statehood, the scope of sovereign authority, and the bounds of rightful state action, international and domestic. The following are some of the more important.

The Treaties of Westphalia, 1648

The Treaties of Osnabruck and Münster, which together form the 'Peace of Westphalia', ended the Thirty Years' War and were crucial in delimiting the political rights and authority of European monarchs. Among other things, the Treaties granted monarchs rights to maintain standing armies, build fortifications, and levy taxes.

The Treaties of Utrecht, 1713

The Treaties of Utrecht, which brought an end to the Wars of Spanish Succession, consolidated the move to territorial sovereignty in Europe. The Treaties of Westphalia did little to define the territorial scope of sovereign rights, the geographical domain over which such rights could extend. By establishing that fixed territorial boundaries, rather than the reach of family ties, should define the reach of sovereign authority, the Treaties of Utrecht were crucial in establishing the present link between sovereign authority and territorial boundaries.

The Treaty of Paris, 1814

The Treaty of Paris ended the Napoleonic Wars and paved the way for the Congress of Vienna (1814–15). The Congress of Vienna, in turn, defined the nature of the post-Napoleonic War settlement, and ultimately led to the Concert of Europe. The

Concert has often been credited with successfully limiting great power warfare for a good part of the nineteenth century, but it is also noteworthy as an institution for upholding monarchical authority and combating liberal and nationalist movements in Europe.

The Peace Treaty of Versailles, 1919

The Treaty of Versailles formally ended the First World War (1914–18). The Treaty established the League of Nations, specified the rights and obligations of the victorious and defeated powers (including the notorious regime of reparations on Germany), and created the 'Mandatories' system under which 'advanced nations' were given legal tutelage over colonial peoples.

The Charter of the United Nations, 1945

The Charter of the United Nations is the legal regime that created the United Nations as the world's only 'supranational' organization. The Charter defines the structure of the United Nations, the powers of its constitutive agencies, and the rights and obligations of sovereign states that are party to the Charter. Among other things, the Charter is the key legal document limiting the use of force to instances of self-defence and collective peace enforcement endorsed by the United Nations Security Council.

The Declaration on Granting Independence to Colonial Countries and Peoples, 1960

Though not a legally binding document, General Assembly Resolution 1514 (XV) signalled the normative delegitimation of European colonialism, and was critical in establishing the right to self-determination, which in turn facilitated the wholesale decolonization of the European empires.

authority directly from God (Bodin 1967: 40). At this time, law was generally understood as the command of a legitimate superior—humanity in general, including monarchs, was subject to God's law and natural law, both of which embodied the command of God. The subjects of particular states were also ruled by municipal law, which was the command of monarchs, who stood above such law. These ideas about divinity, authority, and law had a profound influence on early international law. Derived from the law of nature, international law was understood as a set of divinely ordained principles of state conduct, accessible to all endowed with right reason. European monarchs were obliged to observe international law not because they had reached a contractual agreement with one another, or at least not primarily, but because of fealty to God (Grotius 1925: 121).

In the late eighteenth and early nineteenth centuries, the legitimacy of the absolutist state was challenged by

the principles of liberalism and nationalism. By the second half of the nineteenth century, European states underwent dramatic internal transformations, as the principles of constitutionalism and popular sovereignty weakened monarchs' authority, empowered parliamentary institutions, and extended the franchise. With this transformation came a new conception of law—law as reciprocal accord. Law was deemed legitimate to the extent that it was authored by those who were subject to the law, or their representatives, and it applied equally to all citizens in all like circumstances. Once this ideal was firmly established in the major European states, it started to filter into relations between states, leading to the rise of contractual international law, or what is often termed 'positive' law. International law was now seen as the product of negotiations between sovereign states, not the command of God, and states were obliged to observe such law, not because of fealty, but because they had entered into reciprocally binding agreements with

other states—because international law represents the ‘mutual will of the nations concerned’ (von Martens 1795: 47–8).

Conditioned by these historical forces, the modern institution of international law has developed four distinctive characteristics: a multilateral form of legislation; a consent-based form of legal obligation; a peculiar language of reasoning and argument; and a strong discourse of institutional autonomy.

Multilateral legislation

If we define legislation broadly as the formulation and enactment of legally binding norms or rules, then the legislation of international law takes place both formally and informally. New norms and rules evolve constantly through the informal arguments, social learning, and repeated practices of states and non-state actors. For instance, there is now considerable debate about whether new legal norms are evolving to qualify state sovereignty and permit humanitarian intervention. If such norms are evolving, these processes are far from complete. If they do consolidate, however, it will have been less the result of formal legal codification than persistent normative debate and the reinterpretation of existing legal norms. Informal processes such as these are crucially important, as they are one of the principal means by which customary norms of international law evolve. Customary norms are a special category of international law; they have such high normative standing in the community of states that they are considered binding on all states, irrespective of whether they have consented. Many of the rules governing territorial jurisdiction, freedom of the seas, and the diplomatic immunities of states are customary, and most of these evolved through informal processes (Byers 1999: 3).

In addition to these informal modes of law-making, states have also developed more formal methods of legislation, the most distinctive being the practice of multilateralism. Before the Napoleonic Wars, multilateralism was a relatively marginal institutional practice. States certainly engaged in cooperative practices involving three or more states, but these were often aggregations of bilateral arrangements (such as the Peaces of Westphalia and Utrecht), and were seldom based on reciprocally binding rules of conduct (a mark of true multilateralism (Ruggie 1993)). It was only in the nineteenth century, as liberalism began transforming the internal constitutions of leading European powers, that

multilateralism became the preferred mode of international legislation. If law was legitimate only if those subject to it authored it, and only if it applied equally to all subjects in all like circumstances, then an international means of legislation had to be found that could meet these standards. It was in this context that multilateralism rose to prominence.

Consent and legal obligation

Grotius wrote that states are obliged to obey the law of nations—along with the laws of nature and God—‘even though they have made no promise’ (1925: 121). Fealty to God was the ultimate root of all legal obligations in the Age of Absolutism, and consent constituted a secondary, if still important, source of obligation. This contrasts dramatically with the situation today, in which consent is treated as the primary source of international legal obligation (Henkin 1995: 27). This emphasis on consent is integral to much contemporary discourse on international law. Leaders of states will often use the fact of their consent, or the lack of it, to display their sovereign rights. And critics use evidence of state consent to criticize governments for failing to live up to their obligations under international law.

The status of consent as the principal source of modern international legal obligation is complicated, however, by two things. To begin with, we have already noted that states are, in reality, bound by rules to which they have not formally consented, principally those of customary international law. In determining whether a norm constitutes customary law, scholars and jurists look for general observance of the norm and *opinio juris*, the recognition by states that they are observing the norm because it constitutes law (Price 2004: 107). Both of these are thought to be indicators of tacit consent, but as critics of liberalism have long argued, tacit consent is not the same as actual consent, and extrapolating tacit consent from norm-consistent behaviour is fraught with difficulties. Second, the idea that consent is the principal source of international legal obligation is philosophically highly problematic (Reus-Smit 2003). As the celebrated legal theorist H. L. A. Hart observed, consent can only be obligating if there exists a prior rule that specifies that promises to observe legal rules are binding. But because this rule would be what gives consent its normative standing, consent cannot be the source of that prior rule’s obligatory force (1994: 225).

Language and practice of justification

In addition to its distinctive forms of legislation and legal obligation, the modern institution of international law is characterized by a peculiar language and practice of justification. If we consider the role that international law plays in global life, we see that it operates as more than a pristine set of rules calmly and logically applied to clear-cut situations by authoritative juridical interpreters. International law is alive in the central political debates of international society; it structures arguments about right and wrong, about the bounds of legitimate action, about authority and membership, and about the full spectrum of international issues, from the management of fisheries to the use of force. On close inspection, though, we see that this argument and debate takes a distinctive form.

First, international legal argument is rhetorical. It is tempting to believe that legal argument is strictly logical, that it is concerned with the straightforward, objective application of a rule to a situation. But this ignores the central and inevitable role that interpretation plays in determining which rules apply, their meaning, and the nature of the case at hand. In reality, legal argument appears as rhetorical as it is logical. As Friedrich Kratochwil argues:

Legal arguments deal with the finding and interpretation of the applicable norms and procedures, and with the presentation of the relevant facts and their evaluations. Both questions turn on the issue of whether a particular interpretation of a fact-pattern is acceptable rather than 'true'; consequently strict logic plays a minor role in this process of finding the law.

(Kratochwil 1989: 42)

Second, international legal argument is analogical: it is concerned 'to establish similarities among different cases or objects in the face of (striking) dissimilarities' (Kratochwil 1989: 223). International actors reason with analogies in three different ways. They use them to interpret a given rule (rule A was interpreted in a particular way, and given the logic applied, rule B should be interpreted the same way). They draw similarities between one class of action and another to claim that the former is, or is not, rule-governed (case C was rule-governed, and given the similarities with case D, case D should be rule-governed as well). And they invoke analogies to establish the status of one rule with reference to

Box 18.3 Features of the modern institution of international law

Multilateral legislation

The principal mechanism modern states employ to 'legislate' international law is multilateral diplomacy, which is commonly defined as cooperation between three or more states based on, or with a view to formulating, reciprocally binding rules of conduct.

Consent and legal obligation

It is a norm of the modern international legal system that states are obliged to observe legal rules because they have consented to those rules. A state that has not consented to the rules of a particular legal treaty is not bound by those rules. The only exception to this concerns rules of customary international law, and even then implied or tacit consent plays an important role in the determination of which rules have customary status.

Language and practice of justification

Modern international law is characterized by a distinctive form of argument, justification, or reasoning. As the accompanying text explains, this practice is both rhetorical and analogical.

The discourse of institutional autonomy

In many historical periods, and in many social and cultural settings, the political and legal realms have been entwined. For instance, the Absolutist conception of sovereignty bound the two realms together in the figure of the sovereign. In the modern era, by contrast, the political and legal realms are thought to be radically different, with their own logics and institutional settings. Domestically, this informs ideas about the constitutional separation of powers; internationally, it has encouraged the view that international politics and law are separate spheres of social action. This has not only affected how the academic disciplines of International Relations and law have evolved, but also how state practice has evolved.

other rules (rule E has customary status, and since the same levels of assent and dissent are evident in the case of rule F, rule F should be accorded customary status as well). See Box 18.3.

The discourse of institutional autonomy

The final distinctive characteristic of the modern institution of international law is its strong discourse of institutional autonomy. As students of International Relations, we are accustomed to think of politics and law as separate social domains, as realms of human action with distinct logics and practices. One of the most interesting insights of recent studies is that political actors regularly speak and act as if at some point in a negotiation, at some

stage in a crisis, action moved from the political to the legal realm, a realm in which different types of argument and practice prevail. In the political realm, claims of self-interest and barely veiled coercive practices are considered legitimate if distasteful, but in the legal realm legal reasoning and argument become the legitimate form of action. Compare, for instance, US strategies on Iraq within the confines of the UN Security Council in 2003, where Washington's arguments were constrained by available legal justifications, with its practices outside the Council, where its claims were more self-interested and its practices more openly coercive.

Two things should be noted about this discourse of institutional autonomy. First, imagining the political and legal realms as separate and distinct is a modern phenomenon. In the age of absolute monarchies in Europe, politics and law were joined in the figure of

the sovereign. One of the features of modern, particularly liberal, thought is the idea that political and legal powers need to be separated by quarantining politics to the executive and legislative realms, and legal interpretation and application to the judicial realm. This is what lies behind the modern constitutional idea of a 'separation of powers'. Second, imagining separate political and legal realms in international relations contributes to international order, and is thus politically functional for states. Perception of a legal realm, recognition that a spectrum of issues, practices, and processes are governed by legal rules and procedures, and mutual understanding that certain forms of action are empowered or foreclosed within the legal realm, brings a certain discipline, structure, and predictability to international relations that would be missing in conditions of pure anarchy.

Key Points

- Modern international law is a historical artefact, a product of the revolutions in thought and practice that transformed the governance of European states after the French Revolution (1789).
- Before the French Revolution, in the 'Age of Absolutism', law was understood principally as the command of a legitimate superior, and international law was seen as a command of God, derived from natural law. In the modern period, law has come to be seen as something contracted between legal subjects or their representatives, and international law

has been seen as the expression of the mutual will of nations.

- Because of its historical roots, the modern institution of international law has a number of distinctive characteristics, informed largely by the values of political liberalism.
- The most distinctive characteristics of the modern institution of international law are its multilateral form of legislation, its consent-based form of legal obligation, its language and practice of justification, and its discourse of institutional autonomy.

From international to supranational law?

So long as international law was designed primarily to facilitate international order—to protect the negative liberties of sovereign states—it remained a relatively circumscribed, if essential, institution. This was apparent in four characteristics of international law, at least until the developments of the last three decades. First, states were the primary subjects of international law, the principal bearers of rights and obligations: 'The classic view has been that international law applies only to states' (Higgins 1994: 40). The 1933 Montevideo Convention on the Rights and Duties of States establishes the 'state as a person of international law', defines what constitutes a state, and lays down the principal rights and obligations enjoyed by states (Weston et al.

1990: 12). Second, and related to the above, states were the primary agents of international law, the only actors empowered to formulate, enact, and enforce international law. International law was thus viewed as an artefact of state practice, not the legislation of a community of humankind. Third, international law was concerned with the regulation of inter-state relations. How states interacted with one another fell within the purview of international law; how they operated within their territorial boundaries did not—a distinction enshrined in the twin international norms of self-determination and non-intervention. Finally, the scope of international law was confined—or attempted to be confined—to questions of order not justice. The principal objective

of international law was the maintenance of peace and stability based on mutual respect for each state's territorial integrity and domestic jurisdiction; issues of distributive justice and the protection of basic human rights lay outside its brief (see **Case Study 1**).

In recent decades states have sought to move beyond the simple pursuit of international order towards the ambitious yet amorphous objective of global governance, and international law has begun to change in fascinating ways. First, although states are 'still at the heart of the international legal system' (Higgins 1994:

39), individuals, groups, and organizations are increasingly becoming recognized subjects of international law. The development of an expansive body of international human rights law, supported by evolving mechanisms of enforcement, has given individuals, as well as some collectivities such as minority groups or indigenous peoples, clear rights under international law. And recent moves to hold individuals criminally responsible for violations of those rights—evident in the war crimes tribunals for Rwanda and the former Yugoslavia, and in the creation of the International Criminal

Case Study 1 Is international law an expression of Western dominance?



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From one perspective, international law is easily cast as a Western, even imperial, institution. As we have seen, its roots lie in the European intellectual movements of the sixteenth and seventeenth centuries. Ideas propagated at that time not only drew on ideas of natural law, which could be traced back to ancient Greek and Roman thought, they also drew a clear distinction between international laws that were appropriate among Christian peoples and those that should govern how Christians related to peoples in the Muslim world, the Americas, and later Asia. The former were based on assumptions of the inherent equality of Christian peoples, the latter on the inherent superiority of Christians over non-Christians.

Further evidence of this Western bias can be found in the 'standard of civilization' that European powers codified in international law during the nineteenth century (Gong 1984). According to this standard, non-Western polities were granted sovereign recognition only if they exhibited certain domestic

political characteristics and only if they were willing and able to participate in the prevailing diplomatic practices. The standard was heavily biased towards Western political and legal institutions as the accepted model. On the basis of the standard, European powers divided the world's peoples into 'civilized', 'barbarian', and 'savage' societies, a division they used to justify various degrees of Western tutelage.

Many claim that Western bias still characterizes the international legal order. Cited here is the Anglo-European dominance of peak legal institutions, most notably the United Nations Security Council, and international human rights law, which is said to impose a set of Western values about the rights of the individual on non-Western societies where such ideas are alien. These biases are seen as coming together around the issue of humanitarian intervention. Western powers are accused of using their privileged position on the Security Council, and of brandishing human rights norms, to intervene in the domestic politics of weak, developing countries.

All these criticisms have validity. However, the nature and role of international law in contemporary world politics is more complex than it first appears. To begin with, at the heart of the modern international legal system lies a set of customary norms that uphold the legal equality of all sovereign states, as well as their rights to self-determination and non-intervention. Non-Western states have been the most vigorous proponents and defenders of these cardinal legal norms, and their survival as independent political entities depends on the continued salience of these principles. Second, non-Western peoples were more centrally involved in the development of the international human rights regime than is commonly acknowledged. The Universal Declaration of Human Rights was the product of a deliberate and systematic process of intercultural dialogue, a dialogue involving representatives of the world's major cultures (Glendon 2002). And the International Covenant on Civil and Political Rights, which is often portrayed as a reflection of Western values, was shaped in critical ways by newly independent postcolonial states (Reus-Smit 2001). What is more, international human rights law has been an important resource in the struggles of many subject peoples against repressive governments and against institutions such as colonialism.

Court—indicate the clear obligations individuals bear to observe basic human rights. Second, non-state actors are becoming important agents in the international legal process. While such actors cannot formally enact international law, and their practices do not contribute to the development of customary international law, they often play a crucial role in shaping the normative environment in which states are moved to codify specific legal rules, in providing information to national governments that encourages the redefinition of state interests and the convergence of policies across different states, and, finally, in actually drafting international treaties and conventions. This last role was first seen in how the International Committee of the Red Cross drafted the 1864 Geneva Convention (Finnemore 1996: 69–88), and more recently in the role that non-state actors played in the development of the Ottawa Convention on Anti-Personnel Landmines (Price 1998) and in the creation of the International Criminal Court.

Third, international law is increasingly concerned with global, not merely international, regulation. Where the principles of self-determination and non-intervention once erected a fundamental boundary between the

international and domestic legal realms, this boundary is now being breached by the development of international rules that regulate how states should behave within their territories. Notable here is international trade law and the growing corpus of international environmental law, as well as the previously mentioned body of international human rights law. The penetration of these laws through the boundaries of the sovereign state is facilitated by the growing tendency of national courts to draw on precepts of international law in their rulings. Finally, the rules, norms, and principles of international law are no longer confined to maintaining international order, narrowly defined. Not only does the development of international humanitarian law indicate a broadening of international law to address questions of global justice, but recent decisions by the United Nations Security Council, which warrant international interventions in places like Libya, have seen gross violations of human rights by sovereign states treated as threats to international peace and security, thus legitimating action under Chapter 7 of the UN Charter. In doing so, the Security Council implies that international order is dependent on the maintenance of at least minimum standards of global justice.

Key Points

- So long as international law was designed to facilitate international order, it was circumscribed in key ways: states were the principal subjects and agents of international law; international law was concerned with the regulation of inter-state relations; and the scope of international law was confined to questions of order.
- The quest for global governance is pushing international law into new areas, raising questions about whether international law is transforming into a form of supranational law.
- Individuals, and to some extent collectivities, are gradually acquiring rights and responsibilities under international law, establishing their status as both subjects and agents under international law.
- Non-governmental actors are becoming increasingly important in the development and codification of international legal norms.
- International law is increasingly affecting domestic legal regimes and practices, and the rules of the international legal system are no longer confined to issues of order. As international humanitarian law evolves, issues of global justice are permeating the international legal order.

The laws of war

International law governing the use of force is rightly considered the core of the modern international legal system. Traditionally, such law has divided into two types: *jus ad bellum*, the law governing when states may use force or wage war, and *jus in bello*, the law governing the conduct of war once launched. Two things should be noted about these dimensions of the laws of war. First, from their earliest articulations, they have always been entwined. Second, the content of *jus ad bellum* and *jus in bello* has undergone significant

change, and what were once cardinal norms have, in some cases, been completely reversed. The laws of war have thus been an evolving project, responding over time to the profound social and technological changes that have transformed the international system over the last five centuries.

The most dramatic change has occurred in the central precepts of *jus ad bellum*. Early writings on just war stressed the importance of ‘just cause’, the idea that waging war was justified, morally as well as legally, if a state

was responding to an unwarranted attack or seeking reparations for damages. This was greatly complicated, however, by norms that appeared to cut in the opposite direction. For instance, it was widely believed that sovereign rights could be secured through conquest. In other words, if a ruler succeeded in establishing control over a territory and its people, he or she was the sovereign authority. During the nineteenth century, the idea that just cause established just war gave way to the much more permissive notion that war was justified if it served a state's vital national interests, interests that the state itself had the sole right to define. This was the heyday of the principle that the right to wage war was a fundamental sovereign right, a privilege that defined the very essence of sovereignty. The dire consequences of this principle were evident in the First and Second World Wars, and after 1945 the scope of legally justifiable war was dramatically circumscribed. The Charter of the United Nations confines the legitimate use of force to two situations: the use of force in self-defence (Chapter 7, Article 51), which remained an unqualified sovereign right, and the use of force as part of a Security Council-sanctioned peace enforcement action (Chapter 7, Article 42).

Parallel to these changes, the precepts of *jus in bello* have evolved as well. Here the trend has been less one of radical change in core principles than a gradual expansion of the scope of international legal constraints on permissible conduct in war. Three areas of constraint are particularly noteworthy. The first relates to the kind of weaponry that is legally permitted. The Hague Conferences of 1899 and 1907 were landmarks in this regard, establishing conventions prohibiting the use of expanding bullets, the dropping of bombs from balloons, and the use of projectiles that diffused gases. Since then legally binding treaties have come into force proscribing a range of weaponry, including the use and deployment of landmines and the manufacture and use of chemical weapons.

The second area of constraint relates to how military combatants must be treated. Of central importance here are the four Geneva Conventions of 1864, 1906, 1929, and 1949 respectively, along with their three additional protocols of 1977 (the first two) and 2005 (the third). The third area concerns the treatment of non-combatants, for which the Geneva Conventions were also crucially important. The deliberate targeting of non-combatants has long been proscribed, but in recent years attempts have been made to tighten these proscriptions further. Worth noting here is the successful move to codify rape in war as an international crime.

The evolution of the laws of war is one of the clearest examples of the aforementioned shift from

international to supranational law. This is particularly apparent in the development since the end of the cold war of, first, the international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) and, second, the International Criminal Court (ICC). The last of these is the most ambitious international judicial experiment since the end of the Second World War, established to prosecute the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression (see **Case Study 2**).

Since 2001 the laws of war have come under sustained challenge, as the USA's conduct in the 'war on terror' has pushed the limits of both *jus ad bellum* and *jus in bello*. The Bush administration's invasion of Afghanistan was widely seen as a legitimate act of self-defence, the Taliban government having openly harboured the Al Qaeda terrorist organization responsible for the 9/11 attacks on New York and Washington. The subsequent invasion of Iraq, however, was roundly criticized as a violation of international law. The administration's attempt to establish a new right of 'preventive' self-defence was unsuccessful, and it was unable to persuade a majority of Security Council members that the threat posed by Saddam Hussein was sufficient to justify an international peace enforcement action. A persistent aura of illegality has thus surrounded the Iraq conflict, an aura exacerbated by perceived abuses of *jus in bello* in the war on terror. Most notable here has been the treatment of suspected terrorist combatants. The Bush administration drew major international criticism for its imprisonment of suspects at Guantanamo Bay without the protections of the 1949 Geneva Convention or normal judicial processes within the USA. It was also widely criticized for its practice of 'extraordinary rendition', the CIA's abduction of suspects overseas and their purported transfer to third countries known to practise torture.

Over the past decade, therefore, fears have grown that the established framework of international law is crumbling, unable to deal with the 'revisionist' practices of a unilateralist lone superpower (for an excellent overview, see Steiner et al. 2008). This perception has been accentuated by other notable challenges to the laws of war, challenges that appeared to have the tacit consent of Washington. Israel's invasion of Gaza stands out here, an invasion criticized for grave breaches of the Fourth Geneva Convention by the Goldstone Report of the United Nations Fact Finding Mission on the Gaza Conflict (United Nations 2009a). Soon after assuming the presidency, President Obama moved quickly to bring American practice closer in line with established

Case Study 2 Individual criminal accountability and the non-Western world



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Until recently it was unimaginable that individual leaders of states who commit gross violations of human rights could be prosecuted for their actions. It was long assumed that such figures were protected by the doctrine of sovereign immunity. As the source of national laws and the authority of national courts, they were assumed to be 'above' the law. This coincided with the widespread practice of turning a blind eye to even the most flagrant human rights abuses. Post-authoritarian regimes were often unwilling to pursue former leaders closely associated with security forces; neighbouring countries frequently offered asylum to exiled dictators, and there were few if any international legal mechanisms to hold these figures to account.

In the past twenty years, however, the situation has changed dramatically. The creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the subsequent establishment of the International Criminal Court (ICC), have greatly enhanced the international mechanisms for ensuring individual criminal accountability. Yet this is but one dimension of change.

A growing number of post-authoritarian states have launched their own domestic prosecutions of former leaders, including heads of state. And in several cases, courts in other countries have sought to prosecute the leaders of other states, invoking the principle of universal jurisdiction in cases of gross human rights violations (the most famous example being the attempt by a Spanish court to have the ex-Chilean dictator, Augusto Pinochet, extradited from the United Kingdom). So marked is this proliferation of judicial processes that Kathryn Sikkink has termed it 'The Justice Cascade' (Sikkink 2011).

These developments have not been without their critics, though. Pursuing prosecutions of sitting heads of state is seen by some as undermining efforts to end civil conflicts and ensure transitions to democracy (Snyder and Vinjamuri 2004). International tribunals have been criticized for their slowness and the procedural fairness of their decisions, and, most importantly for our purposes, they have been cast as quasi-imperial tools of the West, institutions sponsored by Western governments and NGOs but focused squarely on crimes committed in weak, often non-Western, countries. Yet, as Sikkink demonstrates, this latter claim is difficult to sustain. Some of the most prominent figures in the long struggle to have individual accountability codified in international criminal law came from the global South, most notably the Egyptian legal scholar and activist Cherif Bassiouni. In the negotiation of the Rome Statute of the ICC, African states were among the most enthusiastic supporters. And while critics like to point out that the ICC's first four cases came from Africa, it is important to recognize that three of these cases were referred to the court by the African governments themselves. Even if these criticisms held for the international tribunals and courts, though, one needs to look more broadly to the growth of national prosecutions. The most dramatic growth has occurred in Latin America, but, as Sikkink shows, such nationally instituted prosecutions have also increased in Africa and Asia (2011: 180).

precepts of international law, issuing an Executive Order to close the Guantanamo detention centre (a move he later retreated from), banning rendition for purposes of

torture, mandating that the Red Cross be given access to anyone detained in conflict, and re-engaging multilateral processes on the use of force.

Key Points



- Placing limits on the legitimate use of force is one of the key challenges of the international community, and the laws of war have evolved to meet this challenge.
- The laws of war have traditionally been divided into those governing when the use of force is legitimate, *jus ad bellum*, and how war may be conducted, *jus in bello*.
- Laws governing when war is legally permitted have changed dramatically over the history of the international system, the most notable difference being between the nineteenth-century view that to wage war was a sovereign right and the post-1945 view that war was only justified in self-defence or as part of a UN-mandated international peace enforcement action.
- Laws governing how war may be conducted divide, broadly, into three categories: those governing weaponry, combatants, and non-combatants.
- Since 2001 both *jus ad bellum* and *jus in bello* have come under challenge as the Bush administration sought to conduct the war on terror without the constraints of established principles of international law, a practice that the Obama administration has sought to reverse.

Theoretical approaches to international law

Like most aspects of International Relations, several theoretical perspectives have been formulated to explain the nature, function, and salience of international law. What follows is a brief survey of the most prominent theoretical perspectives on international law, focusing on those approaches that together constitute the principal axes of contemporary debate.

Realism

Realists are great sceptics about international law, and they are deeply hostile to the liberal-idealist notion of 'peace through law'. George Kennan, the renowned realist diplomat-scholar, argued that this 'undoubtedly represents in part an attempt to transpose the Anglo-Saxon concept of individual law into the international field and to make it applicable to governments as it is applicable here at home to individuals' (1996: 102). The absence of a central authority to legislate, adjudicate, and enforce international law leads realists to doubt whether international law is really law at all. At best, Morgenthau claimed, it is a form of 'primitive law', akin to that of 'preliterate societies, such as the Australian aborigines and the Yurok of northern California' (1985: 295). For realists, international legal obligation is weak at best. Within the state, citizens are obliged to obey the law because sanctions exist to punish illegal behaviour. Yet sanctions have been few in international relations, and enforcement mechanisms are rudimentary. To speak of states having strong international legal obligations is thus nonsensical for realists. (For a more detailed discussion of realism, see Ch. 6).

Neo-liberal institutionalism

Until recently, neo-liberals shied away from directly discussing international law, even though their concept of 'regimes' bore a close affinity (see Chs 7 and 8). This was partly because much of their inspiration came from economic theory rather than from law, and partly because in the realist-dominated field of cold war international relations it was less provocative to speak the language of regimes and institutions than that of international law. Since the end of the cold war, however, neo-liberals have been at the forefront of calls for a more productive dialogue between International Relations and international law. Not surprisingly, though, their understanding of

this dialogue, and the initiatives they have taken to foster it, have been heavily influenced by their rationalist theoretical commitments (see Chs 9 and 10 for criticisms). States are treated as rational egoists, law is seen as an intervening variable between the goals of states and political outcomes, and law is seen as a regulatory institution, not a constitutive one that conditions states' identities and interests (see Goldstein et al. 2000).

Constructivism

As explained in Chapter 10, constructivists argue that normative and ideational structures are as important as, if not more important than, material structures; they hold that understanding how actors' identities shape their interests and strategies is essential to understanding their behaviour; and they believe that social structures are sustained only through routinized human practices (see Ch. 10). These ideas provide clear openings for the study of international law, and it is not surprising that constructivists have found considerable common ground with legal theorists. By broadening our understanding of politics to include issues of identity and purpose as well as strategy, by treating rules, norms, and ideas as constitutive, not just constraining, and by stressing the importance of discourse, communication, and socialization in framing actors' behaviour, constructivists offer resources for understanding the politics of international law which is lacking in realist and neo-liberal thought (see Reus-Smit 2004 and Brunnée and Toope 2010).

The new liberalism

The 'new liberalism' in international relations (which draws on strands of liberal thought discussed in Chs 7 and 8) seeks to reformulate liberalism as a positive social scientific paradigm (Moravcsik 1997: 513). Its three core assumptions are that individuals are the fundamental actors in international relations, that the interests of states are defined by dominant domestic interest groups, and that in the international arena the 'configuration of interdependent state preferences determines state behavior' (Moravcsik 1997: 516–20). Building on these assumptions, Anne-Marie Slaughter has proposed a three-tiered conception of international law. Most provocatively, she disaggregates the state

itself, stressing the transnational linkages between the executive, legislative, administrative, and judicial parts of different states. She then divides international law into three tiers: the voluntary law of individuals and groups in transnational society; the law of transnational governmental institutions; and the law of inter-state relations (Slaughter 1995). Because liberal theory stresses the primacy of individuals and private groups in shaping political and legal outcomes, the traditional ordering of international law, which privileges the international public law of inter-state relations, is turned on its head, with law that directly regulates individuals and groups (the first two tiers) taking precedence. Furthermore, in international public law, law that most directly affects individual-state relations is given priority, thus placing human rights law at the 'core' of international law (Slaughter 2000, 2004).

Critical legal studies

Up to this point we have considered a number of theories bearing the mark of political liberalism. During the 1980s a body of critical international legal theory emerged to challenge the inherent liberalism of modern international legal thought and practice. Often termed 'critical legal studies' or the 'new stream', its proponents argue that liberalism is stultifying international legal theory, pushing it between the equally barren extremes of 'apology'—the rationalization of established sovereign order—and 'utopia'—the naive imagining that international law can civilize the world of states (Koskeniemi 1989).

Their critique of liberalism in international law incorporates four propositions (see Purvis 1991). First, they argue that the underlying logic of liberalism in international law is incoherent. Such liberalism denies that there can be any objective values beyond the particularistic values of individual states, and yet it imagines that international conflicts can be resolved on the basis of objective and neutral rules. Second, critical legal scholars claim that international legal thought operates within a confined intellectual structure. The twin pillars of this structure are liberal ideology and public international legal argument. The former works to naturalize the sovereign order, to place beyond critical reflection the principles of sovereignty and sovereign equality. The latter confines legitimate legal argument within certain confines. '[T]raditional international legal argument', Nigel Purvis contends, 'must be understood as a recurring self-referential search for origins, authority, and

coherence' (1991: 105). Third, critical legal scholars challenge the purported determinacy of international legal rules. Legal positivism holds that a rule has a singular and objective meaning—hence the idea of 'finding the law'. For the critics, this is patently false: 'any international legal doctrine can justify multiple and competing outcomes in any legal debate' (Purvis 1991: 108). Finally, critical legal scholars argue that the authority of international law can only ever be self-validating; it is only through its own internal rituals that it can attain the legitimacy needed to attract state compliance and engagement (Purvis 1991: 109–13).

The practice turn

Echoing developments in International Relations theory (see Adler and Pouliot 2011 and Pouliot 2010), the most recent theoretical approach to international law emphasizes the nature and importance of knowledgeable social practices. In a major new book, Jutta Brunnée and Stephen Toope set out to understand the sources of international legal obligation: why under certain circumstances states feel duty-bound to observe international law (Brunnée and Toope 2010, and see '*Symposium on Legitimacy and Legality in International Law*' 2011). This has been one of the most vexed questions surrounding international law, with realists attributing obligation to fear of coercion, liberal-positivists to state consent, and others to the perceived legitimacy or fairness of legal rules and procedures. Brunnée and Toope argue instead, however, that feelings of legal obligation derive from engagement in legal practices. Legal obligation, they argue, is an 'internalized commitment', a 'feeling' actors have about the legitimacy of a legal order and its attendant rules' (Brunnée and Toope 2010: 45). Such feelings are not internally generated, however; they are socially constructed. Only through social interaction, by participating in international legal practices, do actors develop an internal commitment to observe the law. Not all norm-governed practices generate feelings of 'legal' obligation, however. The practices concerned must meet certain 'criteria of legality'. For practices to be 'legal' they must be general, officially promulgated, prospective, clear, non-contradictory, realistic, constant, and congruent (Brunnée and Toope 2010: 26). 'Only when the conditions of legality are met, and embraced by a community of practice, can we imagine agents feeling obliged to shape their behavior in the light of the promulgated rules' (Brunnée and Toope 2010: 41).

Key Points

- Realists argue that international law is only important when it serves the interests of powerful states.
- Neo-liberals explain how self-interested states come to construct dense networks of international legal regimes.
- Constructivists treat international law as part of the normative structures that condition state and non-state agency in international relations. Like other social norms, they emphasize the way in which law constitutes actors' identities, interests, and strategies.
- New liberals emphasize the domestic origins of state preferences and, in turn, international law. In international law, they stress the need to disaggregate the state to understand transnational legal integration and interaction, and they prioritize international humanitarian law.
- Critical legal studies concentrates on the way in which the inherent liberalism of international law seriously curtails its radical potential.

Conclusion

This chapter opened by noting the 'paradox' of international law—the fact that while scholars often downplay the value and efficacy of international law, sovereign states devote enormous amounts of time and energy to constructing ever more elaborate legal regimes. We then considered the role that institutions play in facilitating coexistence and cooperation among states, and how the modern institution of international law arose historically. It was argued that international law was

both functional to the needs of an increasingly complex international system, but also deeply grounded in ideas about legitimate rule that accompanied the rise of political liberalism. After considering trends that may be transforming international law into a form of supranational or transnational law, we concluded by surveying the principal theories about the nature and efficacy of international law, each of which presents a different set of viewpoints on the 'paradox' of international law.

Questions

- 1 Can you think of other factors, in addition to those listed in the chapter, that contributed to the rise of modern international law in the last two centuries?
- 2 Is the 'paradox of international law' really a paradox?
- 3 Do you find persuasive the argument that states create institutions to sustain international order?
- 4 Can you think of other distinctive characteristics of the modern institution of international law not raised in the chapter?
- 5 Which of the theories of international law surveyed do you find most persuasive, and why?
- 6 If you were asked to predict the future of international law, how would you use the theories surveyed to construct an answer?
- 7 What do you think are the strengths and weaknesses of the international legal system?
- 8 What evidence do you see that international law is transforming into a form of supranational law?
- 9 What are the implications of the rise of supranational law for the sovereignty of states?
- 10 How should we think about the relationship between international law and justice and ethics in international relations?

Further Reading



- Armstrong, D., Farrell, T., and Lambert, H.** (2012), *International Law and International Relations*, 2nd edn (Cambridge: Cambridge University Press). An excellent introduction to international law written for students of International Relations.
- Byers, M.** (2000), *The Role of Law in International Politics* (Oxford: Oxford University Press). A comprehensive collection of advanced essays on the politics of international law.
- Cassese, A.** (2005), *International Law*, 2nd edn (Oxford: Oxford University Press). An outstanding international legal text by a leading scholar and jurist.
- Goldsmith, J. L., and Posner, E. A.** (2006), *The Limits of International Law* (New York: Oxford University Press). A vigorous critique of the institution of international law and its capacity to produce substantial goods for international society.
- Guzman, A.** (2008), *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press). One of the clearest statements of a rational choice theory of international law, which is fruitfully compared with Kratochwil (1989) and Reus-Smit (2004).
- Higgins, R.** (1995), *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press). A very good introduction to international law by a justice of the International Court of Justice.
- Kratochwil, F.** (1989), *Rules, Norms, and Decisions* (Cambridge: Cambridge University Press). The most sustained and advanced constructivist work on international legal reasoning. Compare with Guzman (2008).
- Reus-Smit, C.** (ed.) (2004), *The Politics of International Law* (Cambridge: Cambridge University Press). An edited collection that presents a constructivist perspective on international law, illustrated by a range of contemporary case studies. Compare with Guzman (2008).
- Shaw, M.** (2008), *International Law* (Cambridge: Cambridge University Press). One of the most popular textbooks on international law.
- Simmons, B., and Steinberg, R. H.** (eds) (2007), *International Law and International Relations* (Cambridge: Cambridge University Press). A collection of advanced essays on the politics of international law, drawn from the premier journal *International Organization*.

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