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16 International Law

Donald R. Rothwell

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Introduction

This chapter considers the development, sources and significance of contemporary **international law**. Particular attention is given to the sources of international law, including treaties and customary international law, and some of the distinctive fields of international law such as that governing the use of force. Comment is also made on current international law controversies.

International law is the system of law developed by **states** which governs the relationships between states at either a **multilateral**, regional or **bilateral** level. To that end, international law has traditionally been considered '**state-centric**' in that it is dominated by states which both make international law and are the predominant objects of that law (Shaw 2008: 1). The modern system of international law is often identified as having begun to develop at the time of the **Treaty of Westphalia** in 1648, though there is evidence of its gradual emergence prior to that time. Many prominent international law scholars also existed during the sixteenth and seventeenth centuries, such as the Dutch publicist Hugo **Grotius** whose famous seventeenth century work *De jure belli ac pacis* ('The rights of war and peace') ([1625] 2005) was pivotal in identifying the legal framework between states during times of war and peace. Grotius, who is often described as the 'father' of international law, was also embroiled in the so-called 'battle of books' following the publication in 1609 of his work *Mare liberum* ('The open seas') which was responded to in 1635 by the English author John Selden with *Mare clausum* ('The closed seas') (Brownlie 2008: 224). These two works were fundamental to resolving debates over the developing international law governing the sea (see Grewe 2000: 257–75).

From the seventeenth century onwards international law continued to develop with a principal focus upon the core relationships that at the time existed between states such as trade and commerce, boundaries and territoriality, **war** and **peace**. It was only in the late nineteenth century that international law began to develop an interest in the individual with the 1864 **Geneva Convention** providing protections for soldiers no longer able to take any further part in a battle as a result of being wounded or taken prisoner. In the early part of the twentieth century significant and rapid developments took place in international law, partly due to the efforts of the League of Nations and various conferences that promoted international law. In 1922 the first international court was established – the Permanent Court of International Justice (PCIJ) – located at The Hague in the Netherlands.

The most significant modern development in international law came with the adoption of the **United Nations Charter** in 1945. The Charter, which is a treaty for the purposes of international law, places considerable emphasis on the importance of international law to the **United Nations (UN)**. This is reflected, for example, in Article 1, which identifies one of the purposes of the UN as being to 'bring about by peaceful means, and in conformity with the principles of justice and international law' the settlement of international disputes. To that end, one of the principal organs of the UN established under Article 7 of the Charter is the International Court of Justice (ICJ). Often referred to as the 'World Court', the ICJ is a permanent court located in The Hague and is a successor to the PCIJ. The court is open to all UN members, and to non-UN members who accept its jurisdiction.

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Contemporary development of international law

International law has witnessed significant growth and expansion since the adoption of the UN Charter as states have increasingly sought to regulate their affairs through an ever widening web of multilateral, regional and bilateral treaties which have addressed an expanding array of topics. This growth has been partly driven by the significance attached to international law by the UN Charter, and the prominence given to it through the establishment of the ICJ. The UN has also been directly responsible for the making of new international law, whether through international treaties arising from UN sponsored conferences, or through the adoption by the UN Security Council of resolutions which are binding on UN member states. Other UN affiliated organs and institutions which have promoted the development of new international laws include the Food and Agricultural Organization (FAO), International Labor Organization (ILO) and International Maritime Organization (IMO).

As new international issues have arisen, the response of the international community at both the multilateral and bilateral level has often been to seek to develop new international laws. Therefore, since 1945 there has been a significant growth in new international law addressing maritime boundaries, telecommunications, the regulation of outer space, international health, transnational crime and **terrorism**. This has resulted in a significant expansion in the number of international treaties that states are parties to, thereby increasing the extent of their international legal obligations. However, while international law has steadily developed post 1945, the level of implementation, compliance and enforcement has remained variable. This has raised two significant issues. The first is that international law is lacking in strong enforcement mechanisms, a point emphasised by **realists** (see Chapter 2). Unlike national legal systems, there is no 'international police force'. The UN Security Council certainly plays an important role in monitoring the actions of so-called '**rogue states**', but unless there has been an egregious breach of international law such as the territorial invasion by one state of another, the Council's ability to apply and enforce international law is circumscribed. The second issue is that international law often relies upon strong national legal systems for local enforcement. This is especially the case with international **human rights** law (see Chapter 32). As there are many different national legal systems there is considerable scope for variable interpretation and implementation of international law.

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Institutions

Unlike national legal systems, where there are often a number of law-making institutions such as a parliament, or assembly, there are no predominant international law-making institutions. The UN (see Chapter 21) has certainly played an important role in the post-war development of international law, however UN General Assembly resolutions are not legally binding upon states. UN Security Council resolutions are legally binding under Article 25 of the Charter, although this will still depend upon the precise nature of the resolution and the wording that is used within it. Similar issues exist for other international organisations such as the Organization of American States and the European Parliament, which may or may not adopt laws and resolutions that are binding upon member states.

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Organisations which have oversight of particular international issue areas have a capacity to influence the development of international law. The **World Trade Organization (WTO)** and International Atomic Energy Agency (IAEA) are prominent examples. In addition, under Article 13 of the UN Charter the UN General Assembly established the International Law Commission (ILC) as a permanent body promoting the progressive development of international law and its codification.

The ICJ as the only true world court, is the most significant global judicial institution. The court is composed of 15 judges, from varying legal systems and different countries, who serve nine-year terms. The court is able to adjudicate on contentious cases between two or more states, and can also deliver non-binding advisory opinions. In recent years the number of permanent international courts and tribunals has significantly expanded: as a result of the creation of a range of mechanisms under the WTO for the resolution of trade disputes; the establishment of the International Tribunal for the Law of the Sea (ITLOS), located in Hamburg, to consider law of the sea cases; and, perhaps most significantly, the International Criminal Court (ICC), which is also located in The Hague. The ICC joins two non-permanent international criminal tribunals for Yugoslavia and Rwanda as true international criminal courts with jurisdiction over war crimes, crimes against humanity and **genocide**. Building on the precedent of the post-World War II international military tribunals at Nuremberg and Tokyo, the ICC seeks to ensure that war crimes do not go unpunished, no matter the military rank or political status of the perpetrators. However, the effectiveness of the ICC will be constrained as long as major states such as China, Israel and the US remain resistant to their citizens being held accountable before the court.

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Sources of international law

National legal systems have recognisable sources for their laws. Predominantly, these include the statutes, acts, decrees and proclamations made by a parliament, legislature or the executive (e.g. president or presidential council). In addition, the decisions of the courts and tribunals within national legal systems have a great deal of significance, not only for those parties whose disputes are adjudged by those courts, but for the legal system itself due to the precedent created by those decisions. In developed legal systems, where there is a **hierarchy** of courts at a local, regional, or provincial level, there is often an appellate structure which allows for appeals from lower to higher level courts. The decisions of appellate courts (e.g. Supreme Court, High Court, House of Lords) are binding upon lower courts in national legal systems.

International law does not mirror national legal systems in this regard; it has a distinctive set of recognised sources which are outlined in Article 38(1) of the ICJ Statute (see Box 16.1). Although Article 38(1) strictly only identifies the sources of international law to which the ICJ can refer in its decisions, it is also widely accepted as identifying the sources of international law more generally to which all states in the international community would look. The sources can be divided into two groupings as follows:

- treaties
- customary international law
- general principles of law,

and as subsidiary sources:

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- judicial decisions
- teachings of the most highly qualified publicists.

BOX 16.1: KEY TEXTS

Statute of the International Court of Justice

Article 38(1)

The Court ... shall apply:

a. international conventions ...;
b. international custom ...;
c. the general principles of law recognized by civilized nations;
d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Treaties

Treaties are one of the most significant sources of international law and are an integral part of the conduct of international relations. During the UN era treaties have grown considerably in their importance and number. A treaty is defined by the Vienna Convention on the Law of Treaties (1969) as:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

An instrument which does not meet these criteria is therefore not a treaty and does not create any legally binding obligations between states. Examples would include 'Declarations' issued following a meeting of world leaders at the **G8**, **G20** or regional organisations such as the EU, **APEC** or **ASEAN**. While these documents are written, and often outline agreed positions and commitments, they are not intended to be legally binding and therefore fall short of treaty status. As treaties must be in a written form, an oral treaty is not recognised by international law. While a treaty must be in writing, there is no requirement as to the language in which the treaty is written, and this will often depend upon the official language of each state party to the treaty. Multilateral treaties negotiated under the auspicious of the UN are also written in the six official UN languages (Arabic, Chinese, English, French, Russian and Spanish).

Treaties are entered into between states which are recognised as such for the purposes of international law and international relations. The only exception to this rule applies in the case of recognised international organisations. The constituent units of federal states cannot, therefore, enter into a treaty. Agreements entered into between New York state and the province of Ontario would not be legally binding under international law. The requirement that the treaty be governed by international law goes to the actual intention of the parties, and is an important point of distinction between a legally binding international instrument and a pure political declaration.

'Treaty' is a generic term and not a required title for a legally binding international instrument between states. Other titles may be used of which the terms 'convention' or 'agreement' are also common (see Box 16.2). A treaty may comprise more than one international instrument, and amending or supplementary instruments – often referred to as 'protocols' – will also need to be read alongside the treaty.

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Treaties are a preferred source for the development of new international law because of the flexibility associated with their negotiation. They can be adopted by states at a multilateral level, by a regional international organisation or by a collective of states interested in a regional issue, or by two states bilaterally. Once negotiated at a **diplomatic** gathering, a treaty will often be available for signature by states. However, it is now rare for a treaty to enter into force as a result of signature alone, and the formal act of **ratification** is most commonly required before a treaty will eventually enter into force. Each treaty will have its own particular formula before it enters into force. For multilateral treaties there will be a designated number of states which need to become a party before the treaty enters into force. For bilateral treaties, both of the relevant states need to have ratified prior to entry into force. Some multilateral treaties allow states to lodge written 'reservations', which effectively modify the extent of the legal obligation under the terms of the treaty. In turn, other states which reject the legitimacy of a reservation may seek to lodge an objection to a reservation the consequence of which is that the treaty relationship between the reserving and objecting state will be adjusted. Some treaties also permit the making of 'declarations', which permit a state to indicate its particular interpretation of certain provisions in the treaty. The effect of a declaration is that it places other states on notice as to how one state will interpret particular provisions of the treaty.

The importance of treaties is that once they enter into force the principle of '*pacta sunt servanda*' (treaties must be observed) applies, which means they are legally binding as a solemn undertaking between the states and are to be applied in good faith. As Scott (2004b: 213) has observed 'a treaty is meant to mean just what it says and States are supposed to comply with the obligations they have assumed'. In this respect a treaty is equivalent to a contract between two private parties. It is a legal instrument from which consequences will flow, and if a dispute arises between the parties then certain mechanisms may be available between the parties to resolve their differences. In order to discourage the existence of secret treaties, Article 102 of the UN Charter requires states to register their treaties with the UN Secretariat as soon as the treaty enters into force. A treaty which has not been registered in this manner may not be relied upon before a UN organ, which includes the ICJ.

BOX 16.2 : TERMINOLOGY

Titles given to treaties

Convention: a multilateral treaty commonly adopted at UN conferences; e.g. United Nations Framework Convention on Climate Change.

Protocol: an additional treaty that amends or expands the operation of a Convention; e.g. Kyoto Protocol to the United Nations Framework Convention on Climate Change.

Statute: a multilateral treaty outlining the mechanisms and procedures of an international court; e.g. Rome Statute of the International Criminal Court.

Charter: a multilateral treaty outlining the constitutional framework of an international organisation; e.g. Charter of the Organization of American States.

Agreement: a bilateral or regional treaty; e.g. Australia-US Free Trade Agreement.

Customary international law

The longest standing and continuously dominant source of international law has been customary international law. Though it is now losing some of its previous influence because of the growth of treaties during the UN era, custom remains of considerable

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importance; it and treaties comprise the two predominant sources of contemporary international law.

Customary international law is based upon the practice of states and relies upon a consistency in that practice by individual states, combined with equivalent practice by states around the world. As outlined by the ICJ in the 1969 *North Sea Continental Shelf* case, customary international law requires state practice combined with *opinio juris* – which is a belief by a state that it is under a legal obligation to act in a certain manner. Unlike treaties, which rely upon a written document, custom relies the actions of states, which can be identified through statements and declarations of presidents, prime ministers or ministers, or the acts of state organs such as the military, or border and customs officials. Single, one-off actions are insufficient to establish state practice. There is also a need for consistency in state practice among states from around the world which are representative of differing regions and political, legal and cultural systems. The actions of Western states are not on their own, therefore, capable of creating new customary international law with respect to terrorism, for example. Nevertheless, the ICJ has accepted that in certain instances 'regional custom' may be created.

The significance of customary international law is that it is binding upon all members of the international community once it has been established. Therefore, unlike treaties which are only binding upon the treaty parties, custom is capable of having universal application to all states, even newly emerging states such as East Timor or Kosovo. The only exception to this rule applies in the case of a 'persistent objector' – that is, a state which continually objects to the development of a new rule of customary international law. To do so, however, the state must be vigilant in its protest against the development of the new rule. Custom is also capable of rapid evolution as a result of developments in state practice. Depending on its text, a unanimous UN General Assembly resolution may be an example of 'instant custom'.

General principles of law

The third principal source of international law referred to in Article 38(1) of the ICJ Statute is general principles of law recognised by the legal systems of states. This source utilises the common legal principles which are found across all legal systems throughout the world, irrespective of whether the national legal system is based upon a common law, civil law, or an Islamic law system. The principle of equity is an example of such a general principle drawn from national law which applies in international law and is of significance in maritime boundary delimitations.

Subsidiary sources: judicial decisions and teachings of publicists

Article 38(1) effectively creates a two-tiered system of sources when it identifies two 'subsidiary means' for determining the rules of international law. The first is judicial decisions, which principally encompasses the judgments of international courts and tribunals such as the ICJ, ICC, ITLOS and European Court of Human Rights. It would also extend to relevant decisions of national courts, when those courts are adjudging matters of international law such as the interpretation of a treaty which has significance at the national law level. The second of these sources is the writings of 'the most highly qualified publicists' which includes academic writings of eminent international

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law professors, retired international judges, and current or former diplomats with acknowledged international law expertise. However, as these are only subsidiary sources, they can only be legitimately referred to when the other sources prove to be inadequate. Nevertheless, as the jurisprudence of the ICJ continues to grow there has, perhaps inevitably, been a reliance upon its decisions as evidence of what the international law is in certain particular areas.

Soft law

A modern phenomenon in international relations is the plethora of multilateral and regional meetings convened by international organisations, conferences of parties to international treaty **regimes**, and ad hoc gatherings of states assessing new issues of international importance. A common outcome of these meetings is the adoption of political declarations representing the views of the states as to how certain issue areas should be addressed (see Box 16.3). Alternatively, groups of experts issue reports including draft treaties designed to influence the development of international law. While these declarations, statements and reports are not legally binding, they are commonly recognised as being a part of 'soft law' and capable of influencing the development of new treaties or, as a result of state practice and *opinio juris*, over time forming customary international law.

BOX 16.3: DISCUSSION POINTS

Non-legally binding international instruments

Ad hoc Political Declarations: adopted following an ad hoc meeting of states to discuss matters of common importance; e.g. Johannesburg Declaration on Sustainable Development.

Institutional Declarations: adopted by consensus by an international institution; e.g. APEC Leaders' Declaration, 'The Yokohama Vision – Bogor and Beyond', November 2010.

International Organisation Declarations: adopted by an international organisation following a determinative vote; e.g. The Universal Declaration of Human Rights, UN General Assembly Resolution 217A(III) (1948).

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Major areas of international law

A feature of international law is that it has developed distinctive major fields, which have effectively extended the operation of international law into an ever increasing array of issue areas that are the subject of inter-state and international concern. Some of these are now identified.

Use of force

The international law governing the use of armed force is one of the fundamental areas of contemporary international law, and was a critical area for resolution in the UN Charter, coming as it did at the conclusion of World War II. The Charter did two things in this respect. First, in Article 51 it restated the fundamental right of all states to exercise the right of self-defence by way of a right of either individual or collective self-defence. The US response to the 2001 terrorist attacks upon New York and Washington,

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in which the US along with coalition partners such as the UK and Australia launched an armed response upon Afghanistan, is an example of the exercise of the right of self-defence. Second, Article 39 of the UN Charter also recognised the right of the UN Security Council to authorise military action in response to a 'threat to the peace, breach of the peace, or act of aggression' by way of a range of possible measures taken under Chapter VII of the Charter. Security Council resolutions adopted in 1990 following the Iraqi invasion of Kuwait authorising military action in Iraq are an example of this approach.

Law of the sea

Based upon some of the seminal writings of Hugo Grotius, the law of the sea is principally outlined in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which is often referred to as the 'constitution of the oceans'. The Convention details the extent of coastal states' rights to multiple maritime zones ranging from the territorial sea to the continental shelf, and the parallel rights of the international community to exercise the rights of freedom of navigation and freedom to fish.

Human rights

Contemporary international **human rights** law is founded upon the 1948 Universal Declaration on Human Rights (UDHR) adopted by the UN General Assembly. The UDHR is widely considered to reflect customary international law. The two 1966 international covenants, on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), further expand and develop the operation of the UDHR. In turn this legal base is supported by additional treaties dealing with a range of specific human rights issues such as racial discrimination, torture and the rights of persons with disabilities.

International humanitarian law

The law governing the use of force in armed conflict and its impact upon the participants in that conflict is referred to as **international humanitarian law** (IHL). It is principally based upon the four 1949 Geneva Conventions, and two 1977 Additional Protocols. Together these six treaties provide for a range of protections for combatants who become '*hors de combat*' (unable to further participate in the conflict), prisoners of war, and civilians who are caught up in an armed conflict.

International trade law

The international trading system was significantly reformed following the end of World War II, initially via the **General Agreement on Tariffs and Trade (GATT)** and then in 1994 by the Marrakesh Agreement establishing the World Trade Organization (WTO) (see Chapters 24 and 25). The WTO established a multilateral trading framework which includes compulsory mechanisms for the resolution of trade disputes. This regime is supplement by regional trade treaties, such as those which exist in Europe and North America, and numerous bilateral **free trade** agreements (treaties) between trading partners which are designed to reduce trade barriers and permit the flow of goods between states.

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International environmental law

Since the 1970s there has been a global upsurge in environmental consciousness and this has resulted in the gradual development of a distinctive body of international law dealing with the environment. While there is no overarching global treaty framework in this area, the 1992 Rio Declaration on the Environment (a soft law instrument) does set important parameters for this field, especially with respect to principles such as the precautionary approach and sustainable development. Conventions such as those dealing with climate change, biodiversity, marine pollution and world heritage address a range of global environmental issues (see Chapters 34 and 35).

Contemporary controversies

One of the most contentious areas of international law and international relations is the use of force (see Lowe, Roberts, Welsh and Zaum 2008). The UN Charter was designed to provide an international security framework that would place significant constraints upon the use of armed force in the conduct of international relations, and Article 2(4) of the Charter sought to maintain the territorial integrity and political independence of states against the threat or use of force. Balanced against this, the Charter also recognised the Article 51 right of a state to exercise self-defence. Since the adoption of the Charter, and especially since the end of the **Cold War**, there have been increasing examples of states adopting an expansive interpretation of self-defence. This has resulted in some tension between states, the UN Security Council, and the ICJ. While the international community did not challenge the right of the US to exercise self-defence following the 2001 terrorist attacks on New York and Washington, the US-led invasion of Iraq in 2003 was much more contentious, as it predominantly relied upon UN Security Council resolutions adopted under Chapter VII of the UN Charter dealing with the **disarmament** of Iraq (see A. Roberts 2003). As the Security Council had not expressly endorsed military action against Iraq in 2003, the US and its allies sought to rely upon previous resolutions adopted in 2002 and as far back as 1990. The ambiguity of these resolutions – and the refusal of the US to allow the UN to conclusively determine the matter because of its fear that Iraq possessed **weapons of mass destruction** which would be used to launch an armed attack – ultimately resulted in the US and its allies adopting a **unilateral** interpretation of international law which had little global support from other states, or from international lawyers. These actions contributed to significant doubts being cast over the effectiveness of international law.

Since 2001 international law has also been dealing with the rise of the **non-state actor** (Scott 2004a: 296): that is, participants in international affairs who are not states yet possess some of the capabilities of states, such as **non-governmental organisations** and terrorist organisations. This phenomenon has been pervasive in the response to international terrorism and created significant difficulties in constructing a legal response to terrorist acts. Debates have arisen in a number of fields, such as international human rights law and international humanitarian law, concerning the rights of terrorists to take part in an armed conflict and the way in which military forces should respond to those non-state actors. Some parallels in this debate have also arisen following the upsurge in pirate attacks off the coastlines of states in Africa and Asia. While piracy has been regulated under international law from as far back as the time of Grotius, its modern

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version has raised difficult issues with respect to criminal jurisdiction over pirates once they have been detained, and whether states have an obligation to prosecute pirates for their crimes.

Conclusion

Contemporary international law has undergone enormous growth since the creation of the UN and has expanded into areas of international activity that previously would have been unthinkable. The large number of multilateral and bilateral treaties adopted by states is impressive; however, much remains to be done to ensure that the international legal obligations contained within those instruments are being properly adhered to. Some institutions, such as the WTO, have strong implementation and compliance mechanisms with compulsory dispute settlement. Human rights mechanisms, on the other hand, are not as well developed, notwithstanding UN compliance frameworks. Here there is an interesting contrast between the lack of an international human rights court at the global level, and the existence of regional human rights courts in the Americas and Europe. Nevertheless, despite its high-profile weaknesses and apparent failings, many areas of international law operate at a satisfactory level on a daily basis, underpinning multiple forms of international discourse and engagement at both a state level and an individual level. International telecommunications, air travel, navigation by sea, trade, and the movement of peoples are all dependent upon international law frameworks, and these by and large operate without dispute.

A test for international law is its responsiveness to matters of global concern, and here the track record appears variable. There is still no internationally agreed definition of international terrorism, notwithstanding the events of the early twenty-first century. Likewise, the international community has yet to come to agreement on a replacement regime for the **Kyoto Protocol** to the UN Convention on Climate Change. These examples reinforce the state-centric nature of international law and the need for state cooperation to work collaboratively to solve matters of common concern.

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QUESTIONS

1. By what authority do the United Nations and other multilateral international institutions seek to adopt new international law, such as conventions and treaties, for all countries?
2. International law is often said to only operate on the basis of consent – that is, countries agree to be bound by international law. What would happen to the international legal system if countries elected to opt out of international law?
3. Is the legitimacy of the international legal system diminished by the action of a political body such as the United Nations Security Council adopting legally binding resolutions?
4. Compared to other systems of law (contract law, criminal law), is international law really law?
5. Can international law only be as effective as the mechanisms for its implementation and enforcement? Would it be assisted if there was an international police force?
6. What impact does international law really have upon the conduct of international relations?

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