International LAW in World Politics

AN INTRODUCTION

SECOND EDITION

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Preface

IN THE YEARS SINCE THE FIRST EDITION OF THIS BOOK WAS PUBlished, international law has greatly increased in public prominence. Debate regarding the legality of the 2003 invasion of Iraq continued well after the overthrow of Saddam Hussein and became integral to public discussion regarding the ethics and purpose of the war. Deadlock within the World Trade Organization has highlighted the increased negotiating strength of the developing world, and climate change has shone a spotlight on questions regarding the efficacy of processes of international law creation and enforcement. The questions of the likely impact of the rise of China on US foreign policy and engagement with international law and the extent to which China will during this century be in a position to shape international norms in its own image are, similarly, of topical importance to an audience far broader than the community of international lawyers.

It has therefore never been more important for all those with an interest in world affairs to come to grips with the workings of the system of international law, its core concepts, principles, rules, methods of law creation, and enforcement. It is no exaggeration to say that without such a foundation, students of international relations, world history, or diplomacy are unable to make full sense of their subject matter. Men and women in a range of professions, including journalism, government service, and international business, are now at a disadvantage if they lack literacy in international law.

The primary purpose of *International Law in World Politics* is to introduce international law to those who have no prior training in law. The book is intended to be readable without being simplistic and to provide the reader with a framework within which to understand international legal developments in their political context. It has at the same time proven valuable

for law students who are seeking a political perspective on "black letter" international law. Although context is important to an understanding of any legal system, it is arguably essential to a full appreciation of the workings of international law.

This second edition updates and extends the first edition and includes a chapter dedicated to international law concerning the use of force. I have endeavored to impress on readers the value of reference to international law documents themselves as opposed to reliance on paraphrased accounts of those documents. To that end, I have compiled a volume of documents that can serve as an accompanying text. Essential treaties and primary sources discussed in this edition are referenced to their location in *International Law and Politics: Key Documents*.

Whether you are reading this book as a member of the global community seeking to educate yourself in world affairs or as required reading for a formal course of study, I wish you well in your quest for knowledge and understanding of the system of international law and its functioning in world politics.

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International Law and World Politics Entwined

INTERNATIONAL LAW IS A SYSTEM OF RULES, PRINCIPLES, AND concepts governing relations among states and, increasingly, intergovernmental and nongovernmental organizations, individuals, and other actors in world politics. Features of the modern system of international law appeared in the late nineteenth century; since World War II international law has expanded at a rapid rate such that there is now virtually no aspect of world politics that can be fully understood without some knowledge of international law. International law is also impacting national legal systems to an unprecedented extent. National court cases may turn on a point of international, rather than municipal, law and national decisionmakers must now consider a constantly increasing number of international law obligations in the policymaking process.

International law addresses the environment, trade, arms control, human rights, use of the oceans, terrorism, refugees, and much more, and within each of these fields of international law the number of rules, principles, and concepts continues to increase. This book does not, however, aim to turn readers into experts in any specific field of international law, but to equip them with a mental map of what international law is and how it works as an integral component of world politics. Whether or not they have studied law previously, readers will then be in a position to make sense of specific developments as they occur and to develop a greater depth of knowledge of any particular branches of international law as future needs and interests arise.

If we are to understand how the system operates within world politics, we need to appreciate that although international law is an integral part of politics, it is also to a large extent autonomous. International law has considerable cohesion as a system of interrelated rules, principles, and concepts

that operate within the political milieu and yet are to some extent distinct from it. Political terms such as *sovereignty, state,* and *genocide* may also be used within the system of international law but with different meanings. Chapters 1 to 4 will consider further the entwining of international law with politics before we go on to focus in Chapter 5 on the autonomy of the system of international law.

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

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

A political system can be defined as "any persistent pattern of human relationships that involves, to a significant extent, control, influence, power, or authority."[1] We often think first of national political systems, such as those of the United States or of India, but we can also talk about the politics internal to a school, or even to a family. When we analyze the operation of a political system we find that not everyone has equivalent power. In other words, control over political resources—the means by which one person can influence the behavior of other persons—is not distributed evenly.[2] The study of politics is in large part the study of the process that determines who gets what and who can do what in a particular political unit. At a national level in a democracy, the legislature makes and implements political decisions by passing legislation. Legislation is law, and so we can see that law is one mechanism through which politics may be conducted. Another domestic arena in which decisions are made that impact the distribution of the benefits of society is the courtroom. A legal judgment can have an immediate impact, for example, on who receives a family's inheritance or on whether indigenous people have the same rights to land as other members of society. Politics and law are thus intimately related.

In the same way that domestic politics is entwined with law, international law is integral to world politics and may affect the global distribution

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

A Legislature to Make the Law?

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

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

Treaties. The main source of international law today is treaties, also known as conventions. Treaties are agreements between states, between states and international organizations, or between international organizations. A bilateral treaty is an agreement between two parties. International organizations commonly make agreements with their host state or with a state in which they are conducting a conference. An example of one type of bilateral treaty between states is the extradition treaty, which governs the surrender of fugitives from justice by the fugitive's state of residence to another state claiming criminal jurisdiction. Another example of a bilateral treaty is a status of forces agreement (SOFA), which provides for the legal status of military forces and the conditions under which one state can station them in another state. A SOFA includes, for example, which state has the primary duty to investigate and prosecute members of the armed forces suspected of committing crimes in the receiving state. The United States has concluded status of forces agreements with over fifty

countries in which its troops are stationed or operating.[3] These have often been controversial in the domestic politics of the host countries. In the 1960s, the proposed US-Iran SOFA and the exemption it would grant US military personnel from the jurisdiction of Iranian courts was held up by Ayatollah Ruhollah Khomeini as distastefully reminiscent of the colonial domination of Iran.[4] More recently, the North Atlantic Treaty Organization's Status of Forces Agreement of 1951[5] became a subject of controversy following an incident in which a US Marine EA-6B Prowler on a low-level training flight in the Italian Alps severed a cable-car line, killing twenty people.[6] The US-Japan SOFA came to the fore as an issue in 2001–2002 in relation to rape and arson attacks by US servicemen in Okinawa.[7] The revision of the US-South Korea SOFA became an issue in June 2002 after two United States soldiers driving an armored mine-clearing vehicle in South Korea crushed two school girls to death; the United States had army court-martialed the two service personnel but they were acquitted and rapidly transferred out of the country. Following the terrorist attacks of September 11, 2001, the United States quickly concluded a SOFA with the Kyrgyz Republic in Central Asia, prior to basing combat and combat support units at Manas as part of Operation Enduring Freedom. The US in November 2008 signed a SOFA agreement with Iraq providing for the continued presence of US and multinational forces in Iraq and providing a timetable for their withdrawal by the end of 2011.[8]

In the context of antiballistic missile systems, the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) between the United States and the Soviet Union, another bilateral treaty, was designed to prevent either state from deploying a nationwide antiballistic missile system for defending its territory. The treaty was premised on the idea of "mutually assured destruction" (MAD) as a deterrent to the use of nuclear weapons. In the 1990s the Clinton administration sought unsuccessfully to modify the treaty to permit the deployment of a limited national missile defense system but failed to win the agreement of Russia. Although the treaty is of unlimited duration, its terms provide that each party has the right to withdraw from it, with six months' notification, if it decides that extraordinary events related to the subject matter of the treaty have "jeopardized its supreme interests." In 2001, President George W. Bush decided to abandon the ABM Treaty. The 2002 Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, providing for the reduction and limitation of strategic nuclear warheads by Russia and the United States, is another example of a bilateral treaty relating to arms control.[9]

Multilateral treaties are agreements between three or more states. Those states may belong to one geographical region—it may be an African regional treaty on human rights, for example; or the treaty may aim at global participation in order, for example, to protect the world from catastrophic climate

change. The term *plurilateral* is sometimes used to refer to treaties in which participation is limited by purpose, geography, or both.[10] Some one hundred multilateral treaties have been negotiated per year since 1945.[11] The entwining of international law with world politics is evident in the realm of treaties insofar as treaties are the product of negotiations between states and states can be expected to approach those negotiations—whether on trade or marine pollution—as a political exercise. Each state will bring its own political objectives and strategies to the negotiating table and, as the product of those negotiations, the resultant treaty text is likely to reflect the political compromises that were required to reach agreement.

A treaty is usually dated from the year of agreement on the text. This may differ significantly from the date on which the treaty becomes law and the parties are bound by its terms. The text of the Third United Nations Convention on the Law of the Sea, for example, was agreed in 1982, but the convention did not receive the necessary support to enter into force (become law) until 1994. The UN Charter requires members to register all new treaties with the UN Secretariat, which publishes them in the *United Nations Treaty Series* (*UNTS*), available in hard copy and by Internet.[12] Other places in which to locate treaties are *International Legal Materials* (*ILM*), the *League of Nations Treaty Series* (*LNTS*), the *United Kingdom Treaty Series* (*UKTS*), and Internet collections including the Multilaterals Project at the Fletcher School of Law and Diplomacy at Tufts University, Massachusetts.[13]

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

The earliest known treaty dates from around 3000 B.C., preserved on a border stone between Lagash and Umma in Mesopotamia.[14] The important contemporary principle of *pacta sunt servanda*—that states are bound to carry out in good faith the obligations they have assumed by treaty—is thought to derive from the fact that early treaties were often considered sacred.[15] And although states are expected to carry out their treaty obligations in good faith, a state is not bound by treaties to which it is not a party. This is because a state is, by definition, *constitutionally independent,* which means that a state must consent to be bound by a treaty before it becomes bound, consent being another basic concept in the system of international law.

We will look at the concept of consent more fully in Chapter 5 and at multilateral treaties in more detail in Chapters 8 and 9.

Custom. The second most important source of international law today is custom. Custom is created by what states do, where that action is carried out with

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

Not everything that a state does or does not do contributes to customary international law. Certain habitual practices may emerge; all diplomatic stationery may be of a certain color, for example, for purely pragmatic or practical reasons. The practice of a state can only be used as evidence of custom if the *opinio juris* component is present (i.e., that the state has been choosing to act in that way for reasons of law). Custom can be quite a slow way of creating law, although that is not always the case. The law defining that the airspace superjacent to land territory, internal waters, and the territorial sea is a part of state territory, and as a consequence other states may only use such airspace for navigation or other purposes with the agreement of the territorial sovereign, developed in a relatively short period concurrent with the development of aviation and the impact of World War I.[16]

The entwining of international law with world politics is evident in relation to custom in that it may well have been specific political goals that prompted the state in question to engage in a particular practice (or not to act). The US response to the terrorist attacks of September 11, 2001, and the attitude of other states to that response appears to have confirmed an evolution of customary international law to include a right to use force in self-defense against a terrorist attack (see Figure 1.1).

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

A Police Force to Enforce the Law?

Apart from there not being an international legislature, another difference between most domestic legal systems and the system of international law is that there is no international police force to enforce compliance. For many,

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

The right of a state to defend itself is well established in customary international law. It was also incorporated into treaty law, as article 51 of the United Nations Charter. The type of attack on a state envisaged by the drafters of the Charter was, understandably, that of one state against another. Debate began in the 1980s as to the right of a state to respond with force to terrorism under article 51. When in 1986 the United States claimed that its bombing of military targets in Libya in response to an explosion at the LaBelle disco in Berlin, which killed two US servicemen and wounded seventy-eight Americans, was an act of self-defense, international reaction was largely negative;[1] a draft Security Council resolution condemning the strike was supported by a majority of members of the Security Council but vetoed by the United States and the United Kingdom.[2] A US missile attack of June 26, 1993, which destroyed the Iraqi intelligence headquarters in Baghdad in response to an alleged Iraqi plan to kill President George H. W. Bush, was again justified as self-defense. This time the majority of Security Council members accepted the US position that the attack was a justified act of self-defense, although China and some Islamic states voiced criticism.[3]

On August 20, 1998, the United States launched seventy-nine Tomahawk cruise missiles at targets associated with Osama bin Laden's terrorist network, including paramilitary training camps in Afghanistan and a pharmaceutical factory in Sudan that the United States claimed had been making chemical weapons.[4] Bin Laden had been linked to the bombing on August 7, 1998, of US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. The United States argued that the strikes were in self-defense consistent with article 51 of the UN Charter. Russia condemned the attacks, as did Pakistan and several Arab countries. The Non-Aligned Movement condemned the US attack as "unilateral and unwarranted," and that September, UN Secretary-General Kofi Annan criticized "individual actions" against terrorism, implying disapproval of the US strikes.[5] Most US allies supported the attacks, although France and Italy issued only tepid statements of support.

Following the terrorist attacks of September 11, 2001, the United States constructed an extensive coalition. NATO and parties to the Inter-American Treaty of Reciprocal Assistance identified the terrorist attacks as "armed attacks," as referred to in article 51, and the United States drew a strong link between the Taliban and Al-Qaida, thus implicating a state

(continues)

Figure 1.1 continued

in the "armed attack" as would traditionally have been expected under article 51. In a letter to the Security Council of October 7, the United States stated that it had initiated actions "in the exercise of its inherent right of individual and collective self-defense."[6] Following Operation Enduring Freedom and the wide support given to the US-led coalition bombing in response to September 11, it could be said that customary international law had evolved such that the right of self-defense now included military responses against states that actively support or willingly harbor terrorist groups that have already attacked the responding state.[7]

Five years later, the international community "gingerly accepted" Israel's claim that its use of force in southern Lebanon was a valid act of self-defense against Hezbollah attacks.[8]

Notes

1. Alan D. Surchin, "Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad," *Duke Journal of Comparative and International Law* 5 (1995), 457–497.

2. Draft text no. S/18016/Feb.1, S/PV.2682, April 21, 1986, p. 43.

3. Surchin, "Terror and the Law," 467–468.

4. Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law," *American Journal of International Law* 93, no. 1 (1999): 161–194, esp. 161.

5. Jules Lobel, "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan," *Yale Journal of International Law* 24 (1999), 537–557, esp. 538.

6. Letter to Security Council from the Permanent Representative of the United States of America to the United Nations, addressed to the President of the Security Council, dated October 7, 2001. UN Document S/2001/946 (October 7, 2001).

7. Michael Byers, "Terrorism, the Use of Force, and International Law After 11 September," *International and Comparative Law Quarterly* 51, no. 2 (2002), 401–414, esp. 410.

8. Michael N. Schmitt, "'Change Direction' 2006: Israeli Operations in Lebanon and the International Law of Self-Defense," *Michigan Journal of International Law* 29 (2007–2008), 127–164, esp. 139.

this is a great deficiency of international law and the reason why international law is not more politically effective.[17] It might seem that if states were compelled to respect international law on, say, the use of force, we would live in a much more peaceful and ordered world. The great hiccup here is the concept of "sovereignty" and the related concept of consent. International law operates in a states system that is anarchical, meaning that there is no