

SECOND EDITION

international Law

Classic and
Contemporary
Readings

EDITED BY

Charlotte Ku and
Paul F. Diehl

SECOND EDITION

INTERNATIONAL LAW

Classic and Contemporary Readings

EDITED BY

Charlotte Ku and Paul F. Diehl



BOULDER
LONDON

Published in the United States of America in 2003 by
Lynne Rienner Publishers, Inc.
1800 30th Street, Boulder, Colorado 80301
www.rienner.com

and in the United Kingdom by
Lynne Rienner Publishers, Inc.
3 Henrietta Street, Covent Garden, London WC2E 8LU

© 2003 by Lynne Rienner Publishers, Inc. All rights reserved

Library of Congress Cataloging-in-Publication Data

International law : classic and contemporary readings /

Charlotte Ku and Paul F. Diehl, editors. — 2nd ed.

p. cm.

Includes bibliographical references and index.

ISBN 1-58826-132-8 (alk. paper)

I. International law. I. Ku, Charlotte, 1950— II. Diehl, Paul F. (Paul Francis)

KZ1242.I583 2003

341—dc21

2003043238

British Cataloguing in Publication Data

A Cataloguing in Publication record for this book
is available from the British Library.

Printed and bound in the United States of America



The paper used in this publication meets the requirements
of the American National Standard for Permanence of
Paper for Printed Library Materials Z39.48-1992.

CONTENTS

- 1 International Law as Operating and Normative Systems:
An Overview, *Charlotte Ku and Paul F. Diehl* 1

PART 1 INTERNATIONAL LAW AS OPERATING SYSTEM

Sources of International Law

- 2 A Methodology for Determining an International Legal Rule,
Anthony Clark Arend 23
- 3 Hard and Soft Law in International Governance,
Kenneth W. Abbott and Duncan Snidal 51
- 4 Traditional and Modern Approaches to Customary
International Law: A Reconciliation,
Anthea Elizabeth Roberts 81
- 5 The New Treaty Makers, *Jose E. Alvarez* 109

Participants in the International Legal Process

- 6 State Succession: The Once and Future Law, *Oscar Schacter* 127
- 7 Self-Determination, Minorities, Human Rights:
A Review of International Instruments, *Patrick Thornberry* 135
- 8 Participants in International Legal Relations,
Donna E. Arzt and Igor I. Lukashuk 155

Implementation and Compliance with International Law

- 9 Compliance with International Agreements, *Beth A. Simmons* 181
- 10 The Princeton Principles of Universal Jurisdiction,
The Princeton Project 201

International Legal Structures

- | | | |
|----|--|-----|
| 11 | The Impact of the International Legal System on the Growth of International Courts and Tribunals, <i>Jonathan I. Charney</i> | 221 |
| 12 | WTO Dispute Procedures, Standard of Review, and Deference to National Governments, <i>Steven P. Croley and John H. Jackson</i> | 231 |
| 13 | The Rome Statute of the International Criminal Court, <i>Mahnoush H. Arsanjani</i> | 255 |

PART 2 INTERNATIONAL LAW AS NORMATIVE SYSTEM

To Regulate the Use of Force

- | | | |
|----|--|-----|
| 14 | International Law and the Recourse to Force: A Shift in Paradigms, <i>Anthony Clark Arend and Robert J. Beck</i> | 285 |
| 15 | Legal Control of International Terrorism: A Policy Oriented Assessment, <i>M. Cherif Bassiouni</i> | 311 |

For the Protection of Individual Rights

- | | | |
|----|---|-----|
| 16 | Protecting Human Rights in a Globalizing World, <i>Dinah Shelton</i> | 333 |
| 17 | Beyond Kosovo: The United Nations and Humanitarian Intervention, <i>Ralph Zacklin</i> | 367 |

For the Protection of the Environment

- | | | |
|----|---|-----|
| 18 | Why Domestic Environmental Law Needs a Robust International Environmental Law Regime, <i>A. Dan Tarlock</i> | 385 |
| 19 | Searching for the Contours of International Law in the Field of Sustainable Development, <i>International Law Association</i> | 397 |
| 20 | Responsibility for Biological Diversity Conservation Under International Law, <i>Catherine Tinker</i> | 411 |

Managing the Commons

- | | | |
|----|--|-----|
| 21 | Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law, <i>Christopher C. Joyner and Elizabeth Martell</i> | 441 |
| 22 | Towards a New Regime for the Protection of Outer Space as a Province of All Mankind, <i>David Tan</i> | 469 |

PART 3 THE FUTURE OF INTERNATIONAL LAW

23	International Law—New Actors and New Technologies: Center Stage for NGOs? <i>John King Gamble and Charlotte Ku</i>	505
	<i>Index</i>	531
	<i>About the Book</i>	551

1

International Law as Operating and Normative Systems: An Overview

CHARLOTTE KU AND PAUL F. DIEHL

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

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

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

What Is International Law?

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

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

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

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

The Dual Character of International Law

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

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

The Operating System

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

domestic legal systems are frequently assigned by constitutions to separate institutions. Constitutions also provide legal capacity by allocating power and by recognizing rights and duties. Constitutions further condition the environment in which power is to be used and rights and duties to be exercised. Robert Dahl identified a number of such items that constitutions generally specify, including several of which international law also specifies: competent decisions, accountability, and ensuring stability, to name a few.¹

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

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

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

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

3. **Jurisdiction:** These rules define the rights of actors and institutions to deal with legal problems and violations. An important element is defining what problems or situations will be handled through national legal systems as opposed to international forums. For example, the 1985 Convention

on Torture allows states to prosecute perpetrators in their custody, regardless of the location of the offense and the nationality of the perpetrator or victim, affirming the principle of universal jurisdiction.

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

Our conception of an operating system clearly overlaps with some prior formulations but is different in some fundamental ways. Regime theory² refers to decisionmaking procedures as practices for making and implementing collective choice, similar to “regulative norms,”³ that lessen transaction costs of collective action. Although these may be encompassed by the international law operating system, our conception of the latter is broader. The operating system is not necessarily issue-specific but may deal equally well (or poorly) with multiple issues—note that the International Court of Justice may adjudicate disputes involving airspace as well as war crimes. Regime decisionmaking procedures are also thought to reflect norms, rules, and principles without much independent standing.

H.L.A. Hart developed the notion of “secondary rules” to refer to the ways in which primary rules might be “conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”⁴ This comports in many ways with our conception of an international legal operating system. Yet Hart views secondary rules (his choice of the term *secondary* is illuminating) as “parasitic” to the primary ones. This suggests that secondary rules follow in time the development of primary rules, especially in primitive legal systems (which international law is sometimes compared to). Furthermore, secondary rules are believed to service normative ones, solving the problems of uncertainty, stasis, and inefficiency inherently found with normative rules.

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

the operating system as reflective of the normative system as Hart implies it is. The operating system may develop some of its configurations autonomously from specific norms, thereby serving political as well as legal needs (e.g., the creation of an international organization that also performs monitoring functions). In the relatively anarchic world of international relations, we argue that this is more likely than in the domestic legal systems on which Hart primarily based his analysis.

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

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

Because international law lacks the institutional trappings and hierarchical character of domestic law, its organizing principles and how they work are important to identify. These are the elements of the operating system. First, one must know where to find international law. Because the international legal system has no single legislative body, it is sometimes difficult knowing where to start. One begins with state behavior and examines

the sources of international law to interpret state behavior and to identify when such behavior takes on an obligatory character. The sources of international law further provide guidance on how to find the substance of international law by highlighting key moments in the lawmaking process. Sources help us to locate the products of the lawmaking process by identifying its form. For example, international agreements are generally to be found in written texts. Law created by custom, however, will require locating patterns of state behavior over time and assessing whether this behavior is compelled by any sense of legal obligation. In Chapter 2, the first selection in our collection, Anthony Arend provides a methodology for identifying the existence and extent of an international legal rule. Among his points are that even the obvious, such as a formal treaty, does not necessarily indicate the presence of a legal obligation. Central to his argument for the presence of rules are two conditions: authority (whether decision-makers perceive the rule to be authoritative or not) and control (whether the rule is reflected in state practice or not). In the absence of these, international law cannot be said to exist.

There has been an expansion in the forms of law. This has led to thinking about law as a continuum "ranging from the traditional international legal forms to soft law instruments."⁵ This continuum includes resolutions of the UN General Assembly, standards of private organizations such as the International Standards Organization, as well as codes of conduct developed in international organizations. An example is the adoption of a code of conduct on the distribution and use of pesticides by the Food and Agriculture Organization in 1985. The concept of a continuum is useful because these modes are likely not to operate in isolation but rather interact with and build on each other. Chapter 3, the second selection in Part 1 of this book, contrasts hard and soft international law. States may choose one form of law over the other, and Kenneth Abbott and Duncan Snidal explore some of the rationales for this; for example, hard law provides for more credible commitments than softer legal instruments. The two scholars thus reveal that international law is not inherently weak or strong or necessarily precise or imprecise. Rather, the configuration of law in the international system comes from explicit choice, and, whatever the form, advantages and disadvantages are attendant to it.

This is the case even within more traditional forms of making international law in which customary practice and conventions work in tandem to regulate state behavior. The law applicable to the continental shelf is an example of this, as customary practice became codified in a subsequent convention. Traditional conceptions of international law sources have focused on custom and treaty-making between states. Framed in this way, traditional custom may be seen in steep decline relative to the international community of states' preference for more formal arrangements. In Chapter

4, Anthea Roberts challenges that notion by reconceptualizing the bases of customary behavior. She contends that even though traditional views of custom emphasized consistent state practice over time, we now analyze key statements of leaders and decisionmakers rather than state action. Thus, the balance of modern custom has shifted away from state practice and more toward the perception of a legal obligation (*opinio juris*) by those partaking in international relations activities. Such a conception provides for more numerous instances of customary law and lessens its decline in importance vis-à-vis formal international agreements. Beyond their increase in numbers, treaties have also undergone a metamorphosis in recent decades. Among the most significant changes has been the process of treaty formulation. As Jose Alvarez illustrates in detail in Chapter 5, the last selection in Part 1, the prevalence of states negotiating bilateral treaties has been replaced with multilateral negotiating forums, often under the auspices of international organizations and involving significant input from NGOs and various other private actors that comprise part of civil society.

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

In part because of the expansion in the forms of international law, participants in the international legal process today include more than 190 states and governments, international institutions created by states, and elements of the private sector—multinational corporations and financial institutions, networks of individuals, and NGOs. Not all participants carry the same level of authority in the legal process, but they are recognized either in fact or in practice as playing a role in identifying and promoting particular values.⁶ The partnership struck between NGOs and the government of Canada to promote a convention to ban the use of antipersonnel landmines is an example of the collaboration that various actors have undertaken in the international legal process, thereby giving new actors a role in the law-making and the subsequent implementation process.

It is in the steady increase in both the number and type of participants in the international legal process that we see some of the most tangible changes in international law. This increase is a critical change, because who

is included and who is allowed a voice in the process both affects how the law operates and determines the content of the law. This is amply demonstrated in the intricate political and doctrinal interplay that today serves as the basis for international protection of the environment and the management of the commons.

The increase in participants began with the end of the Thirty Years' War in 1648 and the acceptance of participation by Protestant princes within the same system as Catholic princes in Europe. The next increase resulted from the empire-building activities of the European powers, which brought non-European states into the international legal process. Most recently, the move has been to include individuals and NGOs, including multinational corporations, into the process. Each addition of participants increases the complexity of the lawmaking process. At the same time, many of the issues in international law today require multiple layers of cooperative and coordinated activity crossing public and private sectors for effective regulation and implementation. Complexity, therefore, cannot be avoided and, indeed, may now be required for the effective operation of international law.

Despite this trend toward adding new participants, states remain key to the creation and operation of international law. But how do states become part of the international legal process and under what terms? In Chapter 6, Oscar Schachter describes the interaction between law and politics as reflected in the practice on state succession, which determines each new state's initial legal obligations. This is an especially important concern in the post-Cold War era with the breakup of states in Eastern Europe and other possible changes on the horizon on various continents. Schachter reviews past practice on state succession and reflects on the emerging law in this area; this will become critical as the need increases to sort out the status of various obligations as states continue to implode or separate.

If the addition of states and governments to the system is not a routine matter, the difficulty of adding a different category of participant should be apparent. This is particularly so in the area of individuals, when according them legal status might result in individuals challenging the authority of states. This is also the heart of the issue in Patrick Thornberry's analysis (see Chapter 7) of the rights that groups (especially ethnic groups) might have under international law, including whether special rights to form their own state exist or whether special international protections might be accorded their treatment by the dominant group within states. The developing rights of groups are one of the most sensitive areas for international law as it tries to reconcile potentially inconsistent values. The inconsistency stems from the dilemma most states face in balancing the goal of national unity with a tolerance of ethnic heterogeneity. Yet the issue of how to recognize the existence

of various groups within a common set of borders without compromising the ability of the state to govern its population is emerging as one of the keenest problems of the post–Cold War world.

As the network of international economic activity expands, transnational enterprises are growing in importance as international participants. As Donna Arzt and Igor Lukashuk note in Chapter 8, many of these are more powerful than all but the largest states, yet they mostly lack their own international legal personality. And this is unlikely to change as long as substantial portions of the international community oppose such a status. There has been a major shift, however, since the middle of the twentieth century with individuals undertaking more active rather than passive interactions with international law. And it appears that this trend is only beginning.

A third element of the international law operating system is the process under which law is implemented and actors comply (or fail to do so) with international law. Although the number of international agreements has increased and the requirements are more elaborated, surprisingly little is known about what induces compliance with international obligations. The absence of an international police force and other traditional coercive mechanisms for compliance add to the puzzle of why states obey international law (and, in fact, we know they do so most of the time). Beth Simmons (Chapter 9) reviews different explanations for state compliance. These include those based on *realpolitik* formulations, those based on rationalist ideas, and those that emphasize more normative and less utilitarian considerations. In various ways, she finds each of these lacking in understanding the puzzle.

Another aspect of creating an effective international law operating system is determining how remedies for wrongful acts or grievances will work. This requires an understanding of what the wrongful act or grievance is, who the aggrieved party is, who might be responsible for the act, and the applicable law for the situation. The applicable law will then determine the relevant forum or procedure for examining the grievance and will identify available remedies. Among the most critical of those operating rules concern jurisdiction: Which states are allowed to use their own national courts to prosecute individuals for which crimes? Perhaps the most controversial jurisdiction principle has been universal jurisdiction, which allows any state the right to try the accused, provided they have that person in custody. This principle was central in Spanish attempts to try General Augusto Pinochet for actions he took in Chile, as well as aborted attempts to prosecute Israeli prime minister Ariel Sharon in Belgium for acts committed in Lebanon. The Princeton Project (Chapter 10) has developed a set of guidelines, presented here, for how universal jurisdiction should be applied. This commentary on new principles for universal jurisdiction reveals the various disputes and competing interests that arise in constructing such operating system rules.

The forums and modes for implementation have also expanded. International law has developed vigorously beyond the concept of *dedoublement fonctionnel*, whereby national officials were deemed to function also as international officials in carrying out their duties.⁷ With no separate institutions available to implement international law, this was a reasonable approach. Although international law still relies on domestic legal and political structures for implementation, the international community has also created new international institutions and recognized transnational legal processes that have over time become recognized forums in which to engage in decisionmaking, interpretation, and recently even the prosecution of individuals on the basis of violations of international law.⁸ Not only do representatives of states continue to meet to make law; they also meet routinely in international settings to ensure its implementation and compliance (e.g., meetings of UN organs or the Conference on Security and Cooperation in Europe follow-up meetings after the Helsinki Accords in 1975).

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

The first development is evidenced by studies on transnational law, transnational legal process, and transnational networks. In his classic *Transnational Law*, Philip Jessup coined this term in order to capture the “complex interrelated world community which may be described as beginning with the individual and reaching up to the so-called ‘family of nations’ or ‘society of states.’”⁹ Honju Koh puts a contemporary gloss on this by describing a

transnational legal process . . . whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law declaring fora, then internalized into a nation’s domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.¹⁰

Anne-Marie Slaughter adds a political-science dimension to her contribution by recognizing a diffusion of state power and functions that makes possible the emergence of transnational networks of government regulators and administrators who can set standards and effectively make law.¹¹

On the international level, the most notable operating system development is the creation of international courts to interpret and to implement the law. Standing permanent courts with impartial judges and a published