
The nature of international law and the international system

In the following chapters, much will be said about the substance of international law, the method of its creation and the legal persons or 'subjects' who may be governed by it. The purpose of this first chapter is, however, to examine the very nature and quality of this subject called 'international law'. For as long as it has existed, international law has been derided or disregarded by many jurists and legal commentators, not always because of their own ideology or the political imperatives of the states of which they are nationals. They have questioned, first, the existence of *any* set of rules governing inter-state relations; second, its entitlement to be called 'law'; and, third, its effectiveness in controlling states and other international actors in 'real life' situations. In the first two decades of the twenty-first century, this theoretical rejection of the prescriptive quality of international law by some jurists may appear to have been borne out by the practice of states, groups and individuals who have engaged in internationally 'unlawful' action without even the remotest possibility of their conduct being checked by the international legal system. Whatever the legal merits of the US-led invasions of Iraq and Afghanistan, or the detention of 'terrorist' suspects without trial, or the unhindered resort to indiscriminate violence against civilians by groups based in existing states (with or without the support of another state's government), or the rejection by some of international minimum standards for the protection of the environment, the *perception* has been that international law is failing in one of its primary purposes – the maintenance of an ordered community where the weak are protected from arbitrary action by the strong. Some commentators have even suggested that the twenty-first century needs to accept a new reality where international law is accepted as a political and moral force, but not a *legal discipline*. Others would argue that the *content* of international law should change in order to be less prescriptive and more permissive, especially as the world faces challenges undreamt of when international law first began to be regarded by some as genuinely 'legal' in quality.

There is, of course, some truth in these criticisms, but let us not pretend that we are arguing that international law is a perfect legal system. It is not, but neither is the national legal system of any state. Historically, there have been successes and failures for the international legal system, as there are for the national legal systems of all states. The invasion of Kuwait by Iraq in 1990 and the situation in Libya in 2011 produced a significant and lawful response from the international community, but the United Nations failed in Bosnia, Somalia and Sudan and most recently in Syria in 2012. Likewise, the denial of procedural and substantive rights to those being held in detention by the USA at Guantanamo Bay during the Bush Presidency constituted a violation of the international law of human rights worthy of much

criticism, but it pales beside the activities of Pol Pot in Cambodia in the late 1970s or the Rwandan genocide of the 1990s. On the other hand, these episodes can be contrasted with the successful UN-led efforts to bring self-determination and then independence to East Timor in 2002, the groundbreaking establishment and operation of the International Criminal Court responsible for prosecuting individuals for violation of fundamental international human rights, the protection of civilian populations during the Libyan civil war of 2011 and the continuing impact of the International Court of Justice in regulating states' use of the world's oceans and their natural resources. In other words, the story of international law and the international legal system, like so many other legal systems, is one of achievement and disappointment. So, in much the same way that we would not suggest that the law of the UK is somehow 'not law' because it is currently proving impossible to control cross-border internet crime, it does not necessarily follow that international law should be dismissed as a system of law because there are international actors that seem determined to ignore it.

The way in which the international system deals with these high-profile crises, and the many other less headline-grabbing incidents that occur on a daily basis whenever the members of the international community interact, goes to the heart of the debate about whether 'international law' exists as a *system of law*. However, to some extent, this debate about the nature of international law is unproductive and perhaps even irrelevant. The most obvious and most frequently used test for judging the 'existence' or 'success' of international law is to compare it with national legal systems such as that operating in the UK or Russia or anywhere at all. National law and its institutions – courts, legislative assemblies and enforcement agencies – are held up as *the* definitive model of what 'the law' and 'a legal system' should be like. Then, because international law sometimes falls short of these 'standards', it is argued that it cannot be regarded as 'true' law. Yet, it is not at all clear why *any* form of national law should be regarded as the appropriate standard for judging international law, especially since the rationale of the former is fundamentally different from that of the latter. National law is concerned primarily with the legal rights and duties of legal persons (individuals and companies) within a body politic – the state or similar territorial entity. This 'law' commonly is derived from a legal superior (e.g. a parliament or person with legislative power), recognised as legally competent by the society to whom the law is addressed (e.g. in a constitution), and in situations where the governing power has both the authority and practical competence to make and enforce that law. International law, at least as originally conceived, is different. It is concerned with the rights and duties of the states themselves. In their relations with each other, it is neither likely nor desirable that a relationship of *legal* superiority exists. States are legal equals and the legal system which regulates their actions between themselves must reflect this. Such a legal system must *facilitate* the interaction of these legal equals rather than control or compel them in a poor imitation of the control and compulsion that national law exerts over its subjects. Of course, as international law develops and matures it may come to encompass the legal relations of non-state entities, such as 'peoples', territories, international organisations (governmental and non-governmental), individuals or multinational companies, and it must then develop institutions and procedures which imitate in part the functions of the institutions of national legal systems. Indeed, the re-casting of international law as a system based less on state sovereignty and more

on individual liberty is an aim of many contemporary international lawyers and there is no doubt that very great strides have been made in this direction in recent years. The establishment of the International Criminal Court is perhaps the most powerful evidence of this development. However, whatever we might hope for in the future for international law (see section 1.7), it is crucial to remember that at the very heart of the system lies a set of rules designed to regulate states' conduct with each other, and it is this central fact that makes detailed analogies with national law misleading and inappropriate.

1.1 The role of international law

In simple terms, international law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law such as the United Nations, the Arab League and the African Union (formerly the Organisation of African Unity). As we shall see, that is not to say that international law is unconcerned with the rights and obligations of the individual or non-governmental organisation and, indeed, it may be becoming more concerned with them. Rather, it is that the rules of international law are created primarily by states, either for their own purposes or as a means of facilitating and controlling the activities of other actors on the international plane. Rules of international law cover almost every facet of inter-state and international activity. There are laws regulating the use of the sea, outer space and Antarctica. There are rules governing international telecommunications, postal services, the carriage of goods and passengers by air and the transfer of money. International law is a primary tool for the conduct of international trade. It is concerned with nationality, extradition, the use of armed force, human rights, protection of the environment, the dignity of the individual and the security of nations. In short, there is very little that is done in the international arena that is not regulated by international law and it can now govern some aspects of relations between distinct units *within* a sovereign state, such as the territories of federal Canada or the devolved regions of the UK. International law is the vital mechanism without which an interdependent world could not function. In this sense, international law *facilitates* the functioning of the international community, of which we are all a part and on which we all depend. However, that is not all. Modern international law also seeks to *control* states by inhibiting or directing their conduct both in their relations with other states (e.g. the law prohibiting the use of armed force to settle disputes) and in relation to individuals, both individuals of other states (e.g. issues concerning the exercise of criminal jurisdiction) and its own nationals (e.g. the law of human rights). It is the evolution of international law from a system that was concerned primarily with facilitating international cooperation among its subjects (states), to a system that is now much more engaged in the control of its subjects that is the pre-eminent feature of the history of international law in the last seventy-five years.

It is also important to realise that the practice of international law is intrinsically bound up with diplomacy, politics and the conduct of foreign relations. It is a fallacy to regard international law as the only facilitator or controller of state conduct. It cannot be this and, more significantly, it is not designed to do it. International

law does not operate in a sterile environment and international legal rules may be just one of the factors which a state or government will consider before deciding whether to embark on a particular course of action. In fact, in many cases, legal considerations will prevail, but it is perfectly possible that a state may decide to forfeit legality in favour of self-interest, expediency or 'humanity', as with the Iraqi invasion of Kuwait in 1990 and the US-led invasion of Iraq some thirteen years later. There is nothing surprising in this and it is a feature of the behaviour of every legal person in every legal system, including that of the UK. If it were not so, there would be, for example, no theft and no murder. Indeed, in international society, where politics are so much a part of law, it may be that contextual and flexible rules, so evident in international law, are a strength rather than a weakness.

1.2 The existence of international rules as a system of law

The most cogent argument for the existence of international law as a *system of law* is that members of the international community recognise that there exists a body of rules binding upon them as law. States believe international law exists. When Iraq invaded Kuwait in 1990, or earlier when Tanzania invaded Uganda in 1978/79, the great majority of states regarded the action as 'unlawful', not merely 'immoral' or 'unacceptable'. The same is true of the war crimes committed in Bosnia and Rwanda, and this is given concrete form when the United Nations Security Council imposes sanctions or takes action against a delinquent state, as with that against Libya in 2011 in order to protect civilian populations. The criticism of the US-led invasion of Iraq in March 2003 and of Israel's forceful intervention in Lebanon in July 2006 followed a similar pattern, both being cast by a majority of the international community as a violation of law, not merely as unethical, immoral or undesirable. Similarly, those arguing in support of these uses of force do not dismiss international law as irrelevant, but seek instead to justify the invasions as lawful under the legal rules concerning collective security and self-defence. In other words, even the international actors who engage in potentially unlawful activity do not deny the relevance of international law or its prescriptive quality. This acceptance of the reality of international law by the very persons to whom it is addressed exposes the weakness of those who argue that international law does not exist. Of course, this does not answer questions about its effectiveness, nor does it settle whether it is 'law' in the same sense as that of the UK or of other states. Yet, it does reflect accurately the reality of international relations. How then do we know that states believe that there is a set of rules binding on them as law? What evidence is there of this 'law habit'?

(a) International law is practised on a daily basis in the Foreign Offices, national courts and other governmental organs of states, as well as in international organisations such as the United Nations and the Organisation of American States. Foreign Offices have legal departments whose task is to advise on questions of international law and to assist in the drafting of international agreements and the like. National courts are frequently concerned with substantive questions of international law, as with the series of *Pinochet* cases in the UK concerning questions of immunity and human rights (*R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet*

(No. 3) [1999] 2 All ER 97) and the House of Lords judgment in *R v Jones* [2006] 2 WLR 772 concerning the meaning of the international crime of aggression and its impact on domestic law. In reading the judgment of Lord Bingham in that case, no-one could doubt the legal validity of the system of international law. Similarly, international organisations, in all their forms (both inter-governmental and non-governmental), use lawyers, employing the language of the law, to conduct their everyday business. These organisations and their members accept that they are 'legally bound' to behave in a certain way and will pursue claims against each other alleging a 'breach' of international law.

(b) It is a fact of the utmost significance that states – still the most important of the subjects of international law – do not claim that they are above the law or that international law does not bind them. When Iraq invaded Kuwait it did not claim that the law prohibiting armed force did not apply to it or was irrelevant. Rather, Iraq argued that international law 'justified' its action; in other words, that it was 'legal' by reference to some other rule of international law. Likewise, in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia & Montenegro)* (ICJ 2007), Serbia did not deny the existence of rules of law concerning genocide, but contended rather that it was not internationally responsible for the violations of international law that had taken place. In fact there is no modern day example of a state claiming that it is not bound by general rules of international law, although there is often a great deal of debate as to the precise obligations imposed by that law (as in the *Bosnia Serbia Genocide Case* where there was argument over the precise obligations imposed by the Genocide Convention). This is powerful evidence that states follow rules of international law as a matter of obligation, not simply as a matter of choice or morality. If this were not so, there would be no need for states to justify their action in legal terms when they departed from a legal norm.

(c) Further convincing evidence of the existence of international law is that the overwhelming majority of international legal rules are consistently obeyed. Of course, there will be occasions when the law is ignored or flouted, just as there will be murder and theft in national law. Indeed, the *apparent* ineffectiveness of international law stems from the fact that it is the occasions of law-breaking that receive the most publicity. Some of the modern day and notorious failures of international law, such as the US invasion of Grenada in 1983, the genocide of the Kurds at the hands of the Iraqis and the invasions of Afghanistan and Iraq in pursuit of 'the war on terrorism' are not representative of the whole. Outside of the exceptional cases, the everyday operation of international law goes on in a smooth and uninterrupted fashion. The occasions when a state disregards its treaty or customary law obligations are but a small fraction of the occasions on which those obligations are observed. The same is true of the law of diplomatic immunities, state responsibility and the law of the sea. In short, the vast majority of the rules of international law are obeyed most of the time. Such observance is not headline news.

(d) It is a function of all legal systems to resolve disputed questions of fact and law. International law has to do this and, because it has only a limited number of developed legal institutions, it sometimes fails. That, however, is no reason to doubt its validity as a system of law. Rather, it suggests that *if* international law is to be on a par with national law, it needs to develop better institutions responsible for law creation and enforcement. In comparison with national law, international

law may be regarded as 'weak' law, not because of a problem with its binding quality, but because of its less organised approach to the problems of adjudication and enforcement. On the other hand, it has been suggested earlier that the existence of such institutions is a feature of national law that cannot be adopted wholesale into international law or at least not without modification to suit the requirements of the international system. For example, given that international law regulates the conduct of legal equals, it might be unwise to have a formal and coercive process of law enforcement such as an international 'police force'. All states are powerful in some measure and all have the practical ability to inflict harm on each other whether that be economic, political or military. For example, were the majority of the international community to have taken enforcement action against the Syrian government in 2012 for its gross violations of human rights, what would have been the practical response of Syria's supporters, China and Russia? Those individuals caught in the middle of any resulting conflict might not be comforted by the knowledge that the majority were enforcing international law. The potential for widespread harm beyond those engaging in the unlawful activity is something which national law does not have to deal with. With such a reality, it may be that the best way to regulate state conduct is to proceed on the basis of a system of law that is voluntarily accepted and voluntarily enforced. This does not mean that international law forfeits the right to be called law – because it still obliges states to do certain things. It means, rather, that it is not the same kind of law as national law. Indeed, in those areas where international law does function in a similar manner to national law – as where individuals are given enforceable rights or are subject to personal obligations (e.g. war crimes) – international law has developed institutional mechanisms similar to those existing in national legal systems. The well-established European Court of Human Rights, the War Crimes Tribunals for Bosnia, Rwanda and Somalia and the International Criminal Court are good examples. In other words, when thinking about what 'law' is, and what its purpose is, there is not one measure and not one perfect model.

1.3 The enforcement of international law

Many jurists claim that the hallmark of a system of law is that its rules are capable of being enforced against malefactors. Consequently, one of the most frequent arguments used against international law is that it is not 'true' law because it is not generally enforceable. This raises two issues. First, as a matter of principle, does the existence of any system of law depend on the chances of effective enforcement? Secondly, is it true that international law is not enforceable or effective?

In national legal systems it is assumed that the law will be enforced. If someone steals, provided they are caught, they will be punished. In international law this may not be the case. There was, for example, no formal enforcement action taken against the USA after its illegal invasion of Grenada and no formal condemnation of Israel for invading Lebanon in 2006. We might even suggest that on those occasions when the United Nations has acted (e.g. against Iraq after its invasion of Kuwait), it is more in the way of keeping or restoring the peace than of enforcing the law. Yet is it really true that the test of the binding quality of any 'law' is the presence or

absence of assured enforcement of its rules? It may be that the assumed certainty of enforcement of *national* law masks its true basis and, in the same way, enforcement may be irrelevant to the binding quality of international law. For example, a better view of national law may be that it is 'law' not because it will be enforced, but because it is generally accepted as such by the community to whom it is addressed: the local population. The national society recognises that there must be some rules governing its life and, so long as these come into existence in the manner accepted as authoritative (e.g. in the UK through Act of Parliament), they are binding. In other words, the validity of 'law' may depend on the way it is created, that being the method regarded as authoritative by the legal subjects to whom it is addressed. The fact of enforcement may be a reason why individuals obey the law (and that is not certain), but it is not the reason why it is actually law. In international law, then, the fact that rules come into being in the manner accepted and recognised by states as authoritative (see the 'sources of law' in Chapter 2) is enough to ensure that 'law' exists. Less effective enforcement procedures may encourage states to flout the law more frequently than the individual does in national legal systems (although this is arguable), but that is a question about motives for compliance with law, not about its quality as 'law'.

If international law is regarded as a system of 'law', it is axiomatic that all states are under a legal obligation to abide by its rules. Evidence of the existence of this obligation has been presented in section 1.2. What, however, are the methods which international law does possess for enforcing these legal obligations? While international law has never been wholly dependent on a system of institutionalised enforcement, the absence of a 'police force' or compulsory court of general competence does not mean that international law is impotent. In fact there are a range of enforcement procedures and these are considered immediately below. Reference should also be made to section 1.4 on the reasons for compliance with international law.

1.3.1 The Security Council

Most legal systems provide for the use of forceful sanctions or penalties against malefactors. Under the Charter of the United Nations, the Security Council may take 'enforcement action' against a state when it poses a threat to the peace, or has committed an act of aggression or breach of the peace (Art. 39 and Chapter VII UN Charter). Enforcement action is authorised by resolution of the Council and may comprise military action, as with the use of force by the UN in Korea in 1950, against Iraq in 1990/91 and as authorised (but barely used) against Indonesia over East Timor in 1999/2000; or economic sanctions, as with the trading restrictions and embargoes against South Africa in 1977 and Serbia/Montenegro in 1992; or other similar measures, be they diplomatic, political or social, such as the mandatory severance of air links with Libya (as a result of the Lockerbie incident) in 1992 and April 1993 and the partial embargo imposed on North Korea by SC Res. 1718 (2006) following the latter's nuclear test. The Security Council may even act against non-state entities, as with SC Res. 1390 (2002) imposing financial and economic sanctions against the Al-Qaida organisation and the Taliban.

Of course, there are limitations to the exercise of this power, both political and legal. Until the end of the 'cold war' between the (then) USSR and the USA, enforcement action under the UN Charter was largely impossible, even if there

was a serious outbreak of violence as with the many Arab–Israeli wars since 1945. Obviously, the veto power still enjoyed by the five permanent members of the Security Council, whereby any one negative vote can defeat a draft resolution, was the major cause of this. Indeed, this is not all history, for the threat of a veto, or its use, has meant that the Security Council has been unable to pronounce on the invasions of Afghanistan and Iraq and on the internal crisis in Syria in 2012 (where resolutions were vetoed three times by Russia and China). However, despite these setbacks, it is apparent that the emergence of general, if cautious, cooperation among the five permanent members of the Security Council has led in recent times to the adoption of more ‘enforcement resolutions’ under Chapter VII of the Charter than at any other time in the Organisation’s history and many of the sanctions regimes put in place by these resolutions are ongoing. Moreover, Council action has encompassed many different and diverse conflicts: the straightforward Iraqi aggression against Kuwait, the breakup of the sovereign state of Yugoslavia, the civil wars in Somalia and Sudan, the alleged Libyan sponsorship of aircraft terrorism, the denial of East Timor’s independence by Indonesia and conduct likely to cause the proliferation of nuclear weapons. Of course, it is to be remembered that the Security Council’s powers are exercised in response to a breach of the peace, threat to the peace or act of aggression and they are not specifically intended to meet the non-fulfilment of general legal obligations. Constitutionally, the powers of the Council are designed primarily to preserve the peace rather than to enforce the law, although sometimes these can coincide, as with Iraq and Kuwait. In fact, in an armed conflict, the first task of the Security Council is to stop the fighting and not necessarily to apportion blame or act only against the guilty party. That said, it seems that the Security Council will act more readily in support of international legal principles, although not consistently when one of the permanent members’ vital interests is at stake. However, we must not lose perspective. Ultimately, the issue turns on the political will of states and the degree of cooperation among the five permanent members. As the crisis in Syria demonstrates, the Council (i.e. its members) is not always prepared to enforce even the most fundamental of international norms, even if the threat to international society is obvious and severe and the harm to individuals evident to the world. We also know that when the Big Five’s vital interests are engaged – for example, in Afghanistan, Iraq, the Falkland Isles, Tibet, Chechnya and Lebanon – the Security Council is paralysed politically and legally.

1.3.2 Loss of legal rights and privileges

Another method of enforcing legal obligations is to ensure that any violation of law results in the loss of corresponding legal rights and privileges. For example, if State A violates the terms of a commercial treaty with State B, the latter may be entitled to rescind the whole treaty or suspend performance of the obligations it owes to State A. Of course, this is no hardship to State A if its whole purpose is to avoid the obligations contained in the treaty, but the loss of legal rights or privileges may go further. Thus, on a bilateral level, there may be termination of diplomatic relations, restriction of economic aid or cancellation of supply agreements. In 1982, for example, the UK broke diplomatic relations with Argentina after its invasion of the Falkland Islands, in 1979/80 the USA froze Iranian assets

after the unlawful seizure of its embassy in Tehran and in 2012 the USA froze assets and took other measures against a range of persons and bodies associated with the Syrian government, even though there was not primarily a bilateral dispute between the two countries. Similarly, a state's unlawful action may cause the community at large to impose penalties. Again, this can take various forms, including the expulsion or suspension from inter-governmental organisations, as when the International Atomic Energy Agency suspended Israel after the latter's unlawful attack on an Iraqi nuclear facility in 1981. Likewise, when Iranian students occupied the US embassy in Tehran, several Western industrialised powers cut back on their diplomatic contacts and in 1992 the European Community as a whole imposed trading restrictions on Serbia and Montenegro. Again, in 1995 Nigeria was suspended from the Commonwealth as a result of its violation of human rights. More strikingly, in 1999/2000 the EU imposed limited penalties (now lifted) on Austria – itself an EU member – following the election of what was seen as an extremist government, although whether any breach of 'international law' had occurred is not clear.

These methods of enforcement should not be underestimated for they can cause embarrassment and hardship to the delinquent state. Of course, such methods are overlaid with political and economic considerations and they cannot be regarded as a wholly trustworthy mechanism for the enforcement of legal obligations. They are often more appropriate for dealing with violations of international good practice rather than law and, of course, a state may choose to ignore a blatant violation of international law if it is in its interests to do so. However, on the whole, the loss of legal rights and privileges can have a greater practical effect on a delinquent state than overt displays of force, especially in today's highly interdependent international community.

1.3.3 Judicial enforcement

As we shall see in Chapter 10, there are various procedures for the settlement of disputes by judicial means. As well as ad hoc tribunals, there is the International Court of Justice (ICJ), being the principal judicial organ of the United Nations, and the relatively recent International Criminal Court for dealing with serious violations of international law by individuals (see, for example, the sentence of fourteen years' imprisonment imposed in *The Prosecutor v Thomas Lubanga Dyilo* (2012) for war crimes, the first conviction before the ICC). Moreover, while a state cannot be compelled to use the ICJ for the resolution of a legal dispute, if a matter is referred to it, its award is binding on the parties and must be carried out. For a recent example see, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Merits*, Judgment, (ICJ 2010), where the ICJ ordered monetary compensation to be paid and which has been assessed at USD 95,000, payable by August 2012 (*Ahmadou Sadio Diallo Republic of Guinea v Democratic Republic of the Congo*) (ICJ 2012). In this sense, the ICJ is primarily concerned with the enforcement of international rights and duties, even though the procedure by which states can be compelled to carry out awards of the Court is limited. Such compulsion is by reference to the Security Council and it suffers from all of the defects associated with that body. The procedure has never yet been successfully invoked, although the occasions on which resort to the Council is actually needed are relatively few as the majority of ICJ awards

are carried out by the parties voluntarily, at least where the Court's jurisdiction was not seriously disputed. Of more general concern, however, is the ICJ decision in the *Lockerbie Case (Libyan Arab Jamahiriya v UK and US 1992 ICJ Rep para. 22)*. In this case, Libya had applied to the Court for the indication of interim measures of protection (similar to temporary injunctions) because of alleged threats made by the UK and USA as a response to allegations that Libyan nationals were responsible for the destruction of the aircraft over Lockerbie in 1988. During the hearing of Libya's application, the Security Council adopted enforcement measures and the Court took the view that it was bound to dismiss Libya's claim because of the mandatory Council resolution which decisively characterised Libya's conduct as a threat to international peace (SC Res. 748). This acceptance by the Court of Security Council supremacy in what was clearly a legal dispute, and one that was already before the Court, illustrates very powerfully that matters of legal obligation can become entwined with political necessity in the system of international law. It is likely, however, that the Court will not renounce its jurisdiction if the Council is only considering a dispute, as opposed to when it has actually made a concrete determination of the very question before the Court: see e.g. Judge Lauterpacht's Separate Opinion in the First Phase of the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) 1993 ICJ Rep 325*, and the exercise of jurisdiction in the *Congo Case (2000)*. Certainly, this seems to be the path being taken in cases after the *Lockerbie Case* and this is a welcome, and proper, assertion of the independence of the Court. In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* July 2004 ICJ Rep, the ICJ considered the argument that the General Assembly of the United Nations lacked the power to request an Advisory Opinion on a matter while that issue was being dealt with by the Security Council (see Art. 12(1) UN Charter). This was rejected, one reason being that the mere presence of an item on the Council's agenda did not prevent the Assembly from dealing with an issue that otherwise fell within its responsibilities (see *Opinion on the Legal Consequences* paras. 27–28). Although the point of contention involved the constitutional relationship of the Assembly and the Council, the parallels with the relationship between the Council and the Court are clear and, after all, the Court did not decline to give the Advisory Opinion just because the matter of Israeli/Palestinian relations was constantly before it. This was followed up in the *Advisory Opinion on the Accordance with international law of the unilateral declaration of independence in respect of Kosovo (2008)* with a strong statement about the Court's power, and willingness, to rule on a legal question even if this concerned contentious matters before the Assembly and Security Council and in respect of a dispute where the Security Council had indeed taken concrete measures, although not on the legal question itself. Neither is this new found vigour limited to Advisory Opinions because in the *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece) (2011)*, the ICJ decided that the case was admissible despite the fact, as argued by Greece, that aspects of the dispute between it and the Former Yugoslav Republic of Macedonia were subject to the Security Council attempts at a negotiated settlement. So, although there were raised eyebrows at the reluctance shown by the ICJ in the *Lockerbie Case*, it now seems that that case should be regarded as 'decided by reference to its own special facts' rather than being indicative of the ICJ's general approach. The ICJ has since proven itself

willing and able to rule on a legal question despite even strong political overtones (such as state independence and sovereignty!) and despite parallel action having been taken by the Council. It might be otherwise if the Council is actually taking action when the matter is referred to the ICJ, but even then it may well turn on the nature of the questions being asked, rather than the mere fact that the Council is currently dealing with the issue.

A second welcome development is the growth of specialised judicial institutions concerned with discrete issues of international law. The Iran–US Claims Tribunal, charged with unravelling the legal morass left by the ejection of the USA from Iran in 1979, provides a model for the judicial settlement of inter-state disputes and the Ethiopia/Eritrea Claims Commission is operating in much the same way to resolve issues arising from the separation of these two countries. Similarly, the Yugoslavia, and Rwanda War Crimes Tribunals and the International Criminal Court (ICC) reflect the growing importance of individuals as subjects of international legal disputes. Both the Yugoslavia and the Rwanda Tribunals have tried and convicted and sentenced individuals, and the ICC has laid charges in a number of cases and four trials are underway. In June 2012, after the ICC's first trial, Thomas Dyilo was sentenced to fourteen years' imprisonment for international crimes committed in the Democratic Republic of Congo.

Thirdly, many problems of international law arise in the national courts of states. Usually, this involves a dispute between a state and a private individual but sometimes simply between two nationals. In either case, the national court may decide a substantive question of international law, which will then be binding on the parties. Moreover, awards of domestic tribunals, even if not voluntarily complied with, may be enforced by the normal enforcement machinery of the national legal system, subject only to certain immunities which foreign states enjoy (see Chapter 7). Again, in practice, such awards are seldom ignored because of the effect this would have on the relations between the state of jurisdiction and the state against whom the order was made.

1.4 The effectiveness of international law

It has already been suggested that the great majority of the rules of international law are followed consistently every day as a matter of course. It is normal to obey international law. This is something that is overlooked by some critics of the system and it goes a long way to refute their claims that international law is nothing more than a haphazard collection of principles that can be ignored at will. In this section we will examine some of the reasons why international law does work.

1.4.1 The common good

There is no doubt that a very important practical reason for the effectiveness of international law is that it is based on common self-interest and necessity. Today, international society is more interdependent than ever and the volume of inter-state activity continues to grow. International law is needed in order to ensure a stable and orderly international society. It is in every state's interest to abide by the rules

of international law, for they lay down orderly and predictable principles for the conduct of international relations and international commerce. For example, it is vital that the allocation of the scarce resources of the high seas and ocean floor is achieved smoothly and equitably and it is only through rules of international law – binding on all states – that this can be achieved. Likewise with the protection of the environment and the management of climate change. Thus, a major reason why international law works is that it provides a stable and authoritative regime for the conduct of international relations and the regulation of global issues in an increasingly interdependent world.

1.4.2 The psychological Rubicon

Law has a self-perpetuating quality. When it is accepted that the principles governing the activities of a society amount to 'law', as is the case with states and international law, the rules of that system assume a validity and force all of their own. For example, if a state is presented with a choice of action, one which is legal and one which is not, it will take pressing reasons for the state to act consciously in violation of 'the law'. Breaking international law, like breaking national law, is not a matter to be taken lightly and certainly it is not the *preferred* course of conduct for a state. There is, in other words, a psychological barrier against breaking international law simply because it is law. If a state does embark on such a course of conduct, its action will be described as 'unlawful' or 'illegal', and these are regarded as more powerful forms of criticism than behaviour which is simply 'immoral' or 'unacceptable'. The psychological force of international rules as a *system of law* is a reason in itself why international law is obeyed.

1.4.3 The practitioners of international law

International law operates hand in glove with international politics and diplomacy. Its most potent field of operations is, in fact, in the Foreign Offices and legal departments of the world's governments and in international organisations. While it is tempting to think of international law as operating in the abstract and impersonal terms of 'governments', 'organisations' and 'states', in practice the application of international law is a matter for the considered judgment of some individual somewhere. This may be a judge of the ICJ or national court, a legal adviser at the UN or a government official. Along with the army of legal advisers available to non-governmental organisations, these are the actual practitioners of international law. The crucial point is that the great majority of these officials will have been trained in the national law of their own countries and they are likely to approach international law in the same way as they would any other legal system. The practitioners of international law may have a 'habit of obedience' derived from their own training as national lawyers which serves to encourage respect for international law.

1.4.4 The flexible nature of international law

International law is not an 'adversarial' system of law. As we shall see when considering the sources of international law, many of its rules have evolved from the practice of states and often these do not stipulate rigid obligations or confer overriding

legal rights. Indeed, in some circumstances, the substance of a rule may be unclear, as was the case with the law on the breadth of the territorial sea until the deliberations of the Third UN Conference on the Law of the Sea. It is a fact of the system that in many areas it may not be possible to achieve a clear and unambiguous statement of a state's legal position. This is the flexible nature of international law.

This flexibility may be perceived as a weakness, for states need to know with some degree of certainty the precise scope of their legal obligations and the extent of their legal rights. Uncertainty is the mother of instability. In international law, however, the flexible or open-ended nature of the rules means that disputes are less likely to be seen as 'right' versus 'wrong'. The absence of rigid and precise obligations leads to modest claims and, because there may be no objectively 'right' answer, there is a premium on compromise. Moreover, the flexible nature of international law means that a state may be able to choose from a range of policies, all of which will be legal. It will not be hamstrung or feel 'boxed in'. The fact that international law rarely leaves the state with only one course of action is a great advantage for a system so bound up with politics and diplomacy.

1.4.5 The political cost

There is much a state can lose through a violation of international law. Apart from the legal sanctions that might be imposed (see section 1.3), there are other political and economic costs to be paid. The loss of influence and the loss of trust consequent upon a breach of the law may mean a reduction in overseas trade, loss of foreign aid or a refusal to enter into negotiations over some other matter. Similarly, many states may not be prepared to enter into new treaties with a state if it has a history of violating existing agreements. When the USA invaded Grenada, for example, the loss of influence and trust throughout the states of the non-aligned world was a cost that hampered future US policy in the Caribbean. The same is true of its use of force in Panama in 1989, especially in respect of Latin American states, and the true international cost of US and UK intervention in Iraq and Afghanistan is still not known. Similarly, New Zealand may doubt the bona fides of France after the *Rainbow Warrior* affair and the UK was for many years wary of Argentinian promises after the latter's invasion of the Falkland Islands. Who will listen to a US lecture on human rights while prisoners are detained without trial at Guantanamo Bay and what chance does the current Syrian government have of operating effectively in the international arena after the civil war of 2012? Moreover, apart from these more tangible considerations, one should not underestimate the very public and embarrassing criticism which flows from a breach of international law, especially in such fields as human rights and crimes against humanity. In November 1998, the USA issued an apology 'to the Government and people of Paraguay' following its violation of the Vienna Convention on Consular Relations, as highlighted by the *Case Concerning the Vienna Convention on Consular Relations (Paraguay v US) (Provisional Measures)* 1998 ICJ Rep 248. Unfortunately, this embarrassment was not enough to prevent the USA apparently violating the same Convention in a similar way in the *La Grand* case (*Case Concerning the Vienna Convention on Consular Relations (Germany v US)* 1999 ICJ Rep). Evidently, some states are more easily embarrassed than others.

1.4.6 Sanctions

The types of sanction and the enforcement machinery known to international law have been considered previously. These also will play some part in ensuring that the law is obeyed. They represent one more motive for compliance, as they do in national law.

1.5 The weakness of international law

It would be a mistake to conclude that international law is a perfect system. There is much that could be reformed and enhanced. However, as a practical matter, the development of international law can be achieved only by states themselves. The United Nations, other international organisations and the International Law Commission may propose substantive changes in the law or changes in procedure, but the development of the system depends ultimately on the political will of sovereign states. If the system is believed to work satisfactorily for most of the time, as most states appear to believe, there will be no great movement to reform, especially if this involves a diminution of state power. This is not to underestimate the role that non-governmental organisations play in pushing for reform, but in the final analysis it is only states that can enter into effective multilateral treaties concerning questions of global significance and only states whose practice can influence the speedy development of customary rules of international law. The creation of the International Criminal Court is a good example of when this succeeds, but we still wait for effective international rules on such matters as climate change and the protection of ethnic minorities in existing states.

1.5.1 Lack of institutions

International law lacks many of the formal institutions present in national legal systems. There is no formal legislative body, no court machinery with *general* compulsory jurisdiction and no police force. Of course, this does not mean that the functions typically carried out by such bodies are neglected in international law, for new rules can be created, disputes can be settled judicially and obligations can be enforced. It does mean, however, that international law does not operate in the systematic manner so typical of, say, the legal system of the UK. While this may not be a serious defect because of the different purpose of international law, there will always be some difficulties, especially if malefactors are perceived to be able to violate the law with impunity. The impact of events in Afghanistan and Syria may well cause many states to ponder these weaknesses and it remains to be seen whether the result is a general willingness to violate the law more often (because it is apparent that the system is imperfect) or a desire to do something about the structural enforcement weaknesses of the system. Again, the absence of a central organisation responsible for law creation may be a disadvantage when there is a need to develop a comprehensive and general body of rules, as with the law concerning protection of the international environment. The customary law-making process may be too slow when new rules are needed quickly or circumstances change rapidly, as in the area of international communications. Lastly, the absence of a compulsory court

structure means that some disputes may persist for decades to the detriment of all concerned, as with Argentina and the UK over the Falkland Islands, and India and Pakistan over Jammu-Kashmir.

1.5.2 Lack of certainty

The disadvantage of a system of flexible and open-ended rules is a lack of certainty. It sometimes seems that many of the disputes between states occur precisely because the rule of international law governing their conduct is not clear, rather than that one state is deliberately behaving illegally. For example, disputes generated by trans-boundary pollution (e.g. the Chernobyl incident) are only made worse by the lack of clear rules defining the ambit of state responsibility for apparently lawful acts. On the other hand, if lack of certainty does mean less entrenched disputes, this may be advantageous in a system of law that does not have many formal institutions.

1.5.3 Vital interests

It is true of all legal systems that the vital interests of its subjects may prevail over the dictates of the law. Sometimes this is recognised by the legal system itself, as with the law of self-defence and necessity in international law, but usually it is not. International law is no different from national law in this respect and it is unrealistic to expect perfect obedience. However, it may be that because international law lacks formal enforcement machinery, the temptation and opportunity to violate the law is greater than in other systems. In this sense, international law is 'weaker' than the law of the UK or other states. When a state believes its 'vital interests' to be threatened, it is not certain that international law will be able to prevent illegal conduct. Such was the case, for example, with the invasions of Afghanistan, Iraq and Lebanon, the use of the veto to prevent the Security Council acting in respect of Syria in 2012 and the Israeli violation of Argentinian sovereignty in seizing the war criminal, Adolf Eichmann, in 1960. Yet, this is not to say that international law is irrelevant in times of crises. Importantly, it may serve to modify a state's conduct to bring it closer to the legal norm, if not actually within it. The US bombing of Libya in 1986, for example, appears to have been limited to military targets because this was less likely to be condemned by other states, and the same is true of NATO's bombing of Serbia in 1999. So, while international law may not prevent a state from engaging in illegal conduct when its vital interests (or vital community goals?) are at stake, it may soften that state's reaction to a crisis. Also, on a more general level, it may be that the purpose of international law is not to resolve major political and diplomatic problems at all or to be 'inhibitive' in the same way as national law. One view of international law is that its first task should be to ensure that the international community runs on orderly and predictable lines. In this it largely succeeds.

1.5.4 Vital rules

Every system of law contains rules prohibiting certain conduct which, if unchecked, would destroy the society regulated by that system. In national legal systems there are rules prohibiting murder and other forms of violence, and in international law

there is a general prohibition against the use of force. For some critics, the validity of the legal system as a whole stands or falls by the degree to which these vital rules are obeyed or enforced. International law has had a poor record in this regard and many of the infamous incidents referred to earlier involve the use of force by one state against another. International law often seems powerless to prevent these major ruptures of the fabric of international society and, again, it is weak law because of it. Dealing with the consequences of a violation of these rules is often too late, as the peoples of Kuwait, Bosnia, Iraq, The Sudan and Syria will bear witness.

This is a valid criticism of international law and needs to be recognised as such. However, the inability of international law to prevent or control outbreaks of violence is not as destructive as it would be if it occurred in national legal systems. The factual context of international law is quite different from the operational field of national law and aggression between states is something quite different from acts of violence between individuals. The violence used by an individual in a society can be overwhelmed easily by the forces at the disposal of the central authority with very little chance of major disruption to the state itself. In international society, an act of aggression by one state against another state has far greater consequences and the costs of controlling it *forcefully* are exceptionally high. It is quite possible, for example, for the forces available to the aggressor to outweigh the forces available to the enforcers of the law and, even if they do not, the loss of life and consequential economic damage caused by inter-state violence is quantitatively and qualitatively different from anything likely to occur within national boundaries. This is perhaps the reason why more determined action was not taken in the territory of the former Yugoslavia in the early stages of the dispute. Of course, this is not an argument advocating that international law should have no rules prohibiting acts of violence. Rather, it is a suggestion that because of the field of operation of international law, rules of physical enforcement are not as desirable or practical as they are in other legal systems. This is a fact of international life, albeit not a palatable one.

1.6 The juridical basis of international law

If, then, we accept that international law is 'law', albeit a very different kind of law from that which we find in national legal systems, from where does it derive its legal validity? What is the juridical origin or source of international law? Why is it law? These are questions that have vexed jurists for many years and a number of theories have been developed. These are now considered.

1.6.1 The command theory

John Austin was one of the greatest legal philosophers of the nineteenth century. His view of 'law' was that it comprised a series of commands or orders, issued by a sovereign, and backed by the threat of sanctions (enforcement) if the commands were disobeyed. Consequently, unless the rules of a system amounted to a collection of orders backed by threats, emanating from a sovereign, they were not 'positive law'. This theory has had a profound and, perhaps, unwarranted impact on the search for the juridical origin of international law. According to Austin,

'international law' is not 'positive law' because it does not result from the commands of a sovereign. Customary law, for example, develops through state practice and treaty law develops through consent. Thus, international law, because it is not made up of commands, is properly to be regarded as a species of 'positive morality' and is not within the province of jurisprudence.

As a general description of what law is, this theory has now been largely discredited. The picture of law as a series of commands issued by a sovereign and backed by threats does not even describe national law accurately, let alone international law. Moreover, Austinian theory may be dismissed in so far as it suggests that international law is the same sort of animal as national law. The sovereignty theory misinterprets the function of international law because its primary purpose is not to coerce or command states, but to enable them to interact freely by laying down orderly, predictable and binding principles. Austinian theory cannot explain why states themselves regard international law as binding even when there is no 'sovereign'.

1.6.2 The consensual theory

The basic tenet of the consensual theory is that the binding quality of international law – its existence as 'law' – flows from the consent of states. It is said to be a 'positivistic' system of law based on the actual practice of states. In its pure form, this consensual or positivist theory stipulates that no international law can be created without the consent of the state which is to be bound. Thus, 'new' states would not be bound by pre-existing rules because consent is the source of all legal obligations. International law is said to flow from the will of the state. It is formed from the realities of international life rather than its desirabilities. It is created by what actually goes on (consent), rather than according to some higher moral principles.

This theory recognises that a state's consent may be given in a variety of ways – express in treaties or implied in custom – but essentially the system of international law is based on voluntary self-restriction. In this regard, the consensual theory has certain attractions, for it appears to reflect accurately what goes on in international society. The rule that states are bound by their treaty obligations (*pacta sunt servanda* – treaties must be observed) seems to be based on consent because, as we shall see, treaties are generally binding on a state only if it deliberately and positively accepts the terms. Similarly, it is not inconceivable to regard customary law as being consensual, for consistent state practice may be tantamount to agreeing to be bound by the rule that then develops.

However, there are certain difficulties with the consensual approach to international law, both theoretical and practical. First, as a matter of legal theory, it is not at all clear why states can be bound *only* by self-imposed obligations. There seems to be no necessary reason why this should be so, especially since many rules are not really referable to consent. Indeed, if there exists a rule that says 'states can create law only by consent', where did that rule come from? Where is the legal authority for the *pacta sunt servanda*/consent rule? If we say that states have always behaved as if consent was fundamental to the creation of legal norms, we can ask further why it is that customary practice should have the authority to validate legal rules. In fact, the search for the legal source of the consent rule can go on *ad infinitum*, for we can always ask one more question and take one more step up the 'ladder of authority'.

Secondly, on a practical level, consent does not explain the existence of all legal obligations. The last twenty-five years have witnessed the birth of many 'new' states, including former dependencies of colonial powers and former members of defunct federations (Yugoslavia, USSR). If consent is the basis of international law, how is it that these new states are bound by pre-existing rules of customary law? There is no doubt that they are bound by the general obligations of international law, yet they have not had the opportunity to accept or reject them. It has been suggested that consent for new states is implied, either specifically by their 'first act' of state practice under an existing rule, or generally by acceptance of membership of the international community. This is, however, no more than a fiction, since it would allow states to 'opt out' of certain rules if the intention not to be bound was made known. This simply does not happen, nor would it be acceptable to the existing members of the international community. To talk of consent in such circumstances is unrealistic and ignores the pre-existing validity of international law for new states. Similarly, a change in circumstances may expose an existing state to rules of customary law with which previously it was unconcerned, yet it is still bound without its prior consent. For example, Panama and Liberia did not have the chance of objecting to customary maritime law before they became influential maritime states. In fact, even the binding quality of the ultimate consensual instrument – the treaty – cannot be explained fully by use of the consent theory. There is, for example, a limited class of treaties, known as dispositive treaties, which are mainly concerned with territorial issues and which bind all states. After the UK ceded to China by treaty in 1997 that part of the Hong Kong colony which was sovereign UK territory, no other state claimed (or could claim) that the UK was still the sovereign by alleging that they were not a party to the UK/China bilateral treaty. Other states have not consented to this transfer of jurisdiction but they are bound by it. More importantly, there are certain fundamental rules of customary law (rules of *jus cogens*) which cannot be altered by the express agreement of states, even if in treaty form. If consent was the basis of international law, nothing would be unalterable by treaty.

In general, then, the consensual theory is attractive but it does not describe accurately the reality of international law. When we consider the sources of international law in Chapter 2, it will become apparent that consent is a method for creating binding rules of law, rather than the reason why they are binding.

1.6.3 Natural law

In almost complete contrast to the consensual approach is the theory of international law based on natural law doctrines or 'the law of nature'. This presupposes an ideal system of law, founded on the nature of man as a reasonable being. Thus, rules of law are derived from the dictates of nature as a matter of human reason. International law is said to derive its binding force from the application of 'the law of nature' to the methods of law creation used by states. Natural law can be contrasted with positive (consensual) law, the latter being based on the actual practice of states while the former is based on objectively correct moral principles.

Empirically, natural law theory finds little support in international law. Given that the method of law creation in international law is so heavily dependent on consent

or practice, it is difficult to maintain that there is some guiding body of principles to which states defer when creating law. In general, concrete rules of international law are derived from what states actually do, rather than what 'the law of nature' supposes they should do. However, 'natural law' may be a good *descriptive* label for such concepts as equity, justice and reasonableness which have been incorporated in substantive rules of law, such as those dealing with the continental shelf, human rights, war crimes and rules of *jus cogens*. In this sense, natural law may be part of the sources of international law under the category 'general principles recognised by civilised nations' (see Chapter 2). Natural law does not, however, explain why international law is binding, especially if we remember that the states of the world are so diverse that it is impossible to find any universal moral or ideological thread tying them together.

1.6.4 *Ubi societas, ubi jus*

It may be that the juridical origin of international law lies in practical necessity. It can be argued that 'law' is the hallmark of any political community which exists for the common good. Law is necessary for the society to function and, because it is necessary, it is *ex hypothesi* binding. Therefore, because international society is a community of interacting and interdependent states, it also needs rules governing its life. These are the rules of international law which provide a set of stable, orderly and predictable principles by which the society can operate.

Obviously, this view of international law is a pragmatic and uncomplicated one. To a certain extent it is tautologous because it stipulates that international law is binding because it has to be binding. Apart from this objection, is it also true that states form a 'community' at all? There appear to be few shared values and each state seems more concerned with the interests of itself and its nationals than with the common good. Yet, this is a rather one-sided view of international society and, whatever the practice of a minority of states, isolationism is a thing of the past. There is little alternative to cooperation and compromise in most areas of international activity. The merit of this pragmatic view is that it roots the binding quality of international law in an 'extra-legal' concept. It does not seek to explain international law in terms of the way its rules are created, their substance, or by reference to some higher authority. Rather, the legal quality of international law lies in the fact that it is needed and that this is recognised by states themselves, the legal persons to whom it is addressed.

1.6.5 Variations on a theme

As well as the general theories of international law considered in the previous sections, there are many variations of these themes. These relate both to the structure of international law as a whole and to specific topics within the body of substantive international law. Some of these truly discuss the juridical origins of international law, while others argue for one or other philosophical or theoretical approach to the interpretation or application of existing rules. The following is a selection:

(a) *Deconstructionist theories*. Some jurists (e.g. Koskenniemi) argue that international law has no legal objectivity at all. It is not a system of 'law' in the

sense that it can be used to justify or criticise international behaviour on a rational or objective basis. It is, rather, a conjunction of politics, morality and self-interest that can be used alternatively to justify or condemn any behaviour according to the standpoint of the critic. Legal language and the apparent habit of obedience are seen as smokescreens for behaviour that would have occurred in any event and for reasons unrelated to the existence of a so-called legal rule.

(b) *'Value' orientated theories.* Some jurists (e.g. McDougal, Lasswell and Feliciano) see the role of international law as the pursuit of certain pre-existing community values. All rules should be interpreted and applied consistently with these values. Of course, this presupposes that there is agreement as to what these 'values' actually are, although 'world public order' is a favourite starting point.

(c) *Realist theories.* Some jurists argue that the real importance of international law lies not in the validity or otherwise of its claim to be law, but in the impact it makes on the conduct of international relations (see the analysis in Scott, (1994) 5 *EJIL* 313). It is enough to justify the existence of international law that it is accepted as a major influence on international politics; whether or not it is accepted as law is neither here nor there, nor whether it is disobeyed or obeyed. Its function as the oil in the engine of international politics is what matters.

(d) *Non-statist theories.* Some jurists reject the fundamental concept of international law as a system of law created primarily by states for states. They argue, from differing starting points, that this is far too narrow a view of international law, especially in the modern era (see e.g. Allot in *Eurocrisis*). Such jurists often stress the importance of international law for individuals, or as a means of achieving justice (sometimes at the expense of stability) or as a means of accommodating the cultural and ethnic diversity of a modern international society that is no longer centred on Europe. This is a favourite theme of the modern era and gains many supporters because of the possibility that international law could be used to check the excesses of otherwise sovereign states. Whether such a view of international law would be possible without the foundations laid by legal rules that were undoubtedly created by states, for states, is an open question.

Any attempt to reach a conclusion about the nature of international law or its claim to be a 'system of law' is bound to attract criticism from all sides. Yet it must not be forgotten that the origin of the binding character of law is a *general* problem. It is an issue for national law as well as international law. Usually, in national legal systems there are formal institutions, like the UK Parliament, whose task is to create law and which may be regarded as a 'source of law'. However, while the existence of such institutions enables us to identify what is or is not 'a law', they do not explain why it is law. It may be that the constitution authorises Parliament to make law, but from where does the constitution derive its authority? This is a problem we have seen before. In national systems, the search for the juridical origin of law goes beyond the existence of institutions or constitutions and international law loses nothing in this respect by their absence. The juridical origin of law is a large question and it is a mistake to think that only international law fails to find an answer. In the end, if an answer to this question is needed, the first and most powerful reason why international law is to be regarded as law is that it is recognised as such by the persons whom it controls, the states and other subjects

of international law. If this begs the question somewhat, we should remember that international law is not the only system to be unsure of the answer.

1.7 The future of international law

The 'decade of international law' (GA Res. 45/90) has come and gone and the international community has entered the twenty-first century. At the start of the 1990s, the end of the 'cold war' brought uncertainty but actually heralded a new era of cooperation among the five permanent members of the Security Council and a consequential increase in the influence of the United Nations. The world is too uncertain to predict whether the present decade will witness further fundamental changes in the organisation of the international community, but the challenges facing international law are no less pressing.

The next few years will see the wider exercise of jurisdiction by the International Criminal Court and, no doubt, a widening of the scope of international law to embrace in even more detail non-state entities such as individuals, organisations and corporations. This is nothing new, but perhaps the pace of this development will gather speed. Likewise, to give but a few examples, there will be significant advances in international environmental law (see, for example, the ongoing ICJ cases, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (2011) and *Whaling in the Antarctic (Australia v Japan)* (2010)), in the law of international communications and more treaty codification of customary law. In the United Nations itself, calls for the abolition of the 'veto' and/or an increase in the number of permanent members of the Security Council are becoming louder and more persistent. In contrast, many international lawyers believe that 'regionalisation' will replace 'universality' as the most effective template for managing the international community. So, perhaps, there will be different rules of international law for Europe, and Africa or North America. Certainly, regional organisations seem more prepared to take on the task of regulating the conduct of its members rather than submit to 'outside' regulation. There is uncertainty, but the world is changing and international law must change with it.

All this will have an impact on a system of law that was conceived originally as a set of rules to govern sovereign states in their international relations. Of course, it remains true that the majority of concrete rules of international law are created by states for states and that conceptions of 'sovereignty' and independence are deeply rooted in the fabric of international society. Nevertheless, it seems that the institutions of international law are changing, and will have to change further, to accommodate the slow but steady move to rules aimed at controlling states (even in their dealings with their own nationals inside their own territory) instead of rules which simply facilitate their interaction. Much will depend on how international law copes with the issue of effective enforcement. A set of rules that *facilitates* interaction between states without over-prescribing a particular course of action can survive with little or weak enforcement machinery. A set of rules that seeks to *control* states in their actions needs a stronger enforcement mechanism if it is to achieve its goals. Is this likely, or will the attempt fail and bring the whole edifice of international law into disrepute?

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SUMMARY

The nature of international law and the international system

- International law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law. It operates alongside international diplomacy, politics and economics.
- The most cogent argument for the existence of international law as a *system of law* is that members of the international community recognise that there exists a body of rules binding upon them as law. States believe international law exists. This acceptance of the reality of international law by the very persons to whom it is addressed exposes the weakness of those who argue that international law does not exist.
- While international law has never been wholly dependent on a system of institutionalised enforcement, the absence of a 'police force' or compulsory court of general competence does not mean that international law is impotent.
- There is no doubt that a very important practical reason for the effectiveness of international law is that it is based on common self-interest and necessity. Today, international society is more interdependent than ever and the volume of inter-state activity continues to grow. International law is needed in order to ensure a stable and orderly international society.
- It would be a mistake to conclude that international law is a perfect system. There is much that could be reformed and enhanced. There is a general lack of institutions; the content of the rules of international law can be uncertain; states may elect to ignore international law when their vital interests are at stake; states are able to violate basic rules, such as the prohibition of violence without fear of being coerced.
- The juridical force of international law does not derive from a traditional conception of law, nor is it based on consent, or derived from natural law. Its force comes from the fact that it is needed to ensure that international society operates efficiently and safely. 'Law' is the hallmark of any political community and is necessary for the society to function and, because it is necessary, it is *ex hypothesi* binding.