Public International Law

Contemporary Principles and Perspectives

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argument – for example, an argument for independence (ascending) will be countered by an argument for equality (descending). However, because the concept of independence can be justified by reference to principles of equality and vice versa, Koskenniemi argues that the characterizations of all legal arguments can be reversed.[113] Their underlying bases are fluid, inherently reversible concepts. Therefore, when making a decision as to the supremacy of one argument over another, there is no objective manner in which that decision can be made.[114] It cannot be said that one pattern of argument, or one particular conceptual category, should always be supreme. Such opinions emblematize the differing conceptions of international law and lead to the quintessential question of what is international law.[115]

1.4.2.2.5 Third World theory Third World theory presents a critical approach to international law that argues for change in the role and objectives of the current international order with particular regard for the perceived disempowerment of Third World states.[116] Third World theorists eschew attempts to define 'Third World' as having a distinct geographical definition, acknowledging lack of total cohesion amongst its members, and focusing instead on shared traits of under-development and marginalization.[117] This approach criticizes the role of international law in entrenching power imbalance between the developed and developing states, and assumptions of its universal application. Instead, it is argued that the rules of international law – which were conceived to serve the interests of the ruling powers of the time – should be re-evaluated given the emergence of developing Asian and African states,[118] and the radical changes in the make-up of the international community since the inception of international law. Third World theory is not a 'method' for an analysis of what is international law, per se. Rather, it is a framework within which legal scholars argue for the need for international law to

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113 Ibid., 505.

114 Ibid., 508.

115 See discussion of this issue below at section 1.6.

116 See, generally, A.A. Fatouros, 'International Law and the Third World', (1964) 50 *Virginia Law Review* 783, and Maurice Flory, 'Adapting International Law to the Development of the Third World', (1982) 26 *Journal of African Law* 12.

117 Fatouros, above note 116, 785.

118 See, generally, Wolfgang Friedmann, 'The Position of Underdeveloped Countries and the Universality of International Law', (1963) 2 *Columbia Society of International Law*, 78, and R.P. Anand, 'Role of the "New" Asian-African Countries in the Present International Legal Order', (1962) 56 *American Society of International Law*, 383.

reflect a consensus amongst the international community, including newly emerged states.[119]

1.4.2.2.6 Feminist theory A feminist approach to international law is based on the same principles that underpin feminist theory at a domestic level. Feminist theory at the international level thus contends that the structure, actors and processes of international law fail adequately to take into account females and are inherently skewed towards a male gender bias. Feminist theory in relation to the international field has only gained significant traction since the early 1990s,[120] although feminist activism in the international sphere has been long established.

While there exist different feminist theories, a broad feminist approach at a national level is to question 'the claims of national legal systems to impartiality and objectivity, arguing that they deliver a sexed and gendered system of justice'.[121] Applying this to international law, feminists 'scrutinise international law and ... challenge its universal basis'.[122] Charlesworth and Chinkin see feminist analysis of international law as having two main roles.[123] The first is the 'deconstruction of the explicit and implicit values of the international legal system, challenging their claim to objectivity and rationality because of the limited base on which they are built'.[124] This is based upon the idea that as women have been largely excluded from the 'construction' of international law, the values adopted by the international legal system do not have a female perspective and thus must be challenged, or deconstructed. The second role is that of reconstruction. This 'requires rebuilding the basic concepts of international law in a way that they do not support or reinforce the domination of women

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[119] Anand, above note 118, 387.

[120] Charlesworth, above note 89, 407.

[121] Ibid. For a history of the evolution of feminist theory, see Elizabeth Gross, 'What is Feminist Theory?', in Carole Pateman and Elizabeth Gross (eds), *Feminist Challenges: Social and Political Theory* (Sydney and London: Allen & Unwin, 1986), 190.

[122] Charlesworth, above note 89, 407.

[123] Hilary Charlesworth and Christine M. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Executive Park, NY: Juris Publishing Inc., 2000), 60. See also Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist Approaches to International Law', in Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (Oxford and New York: Oxford University Press, 1996), 256; Christine Chinkin, 'Feminism, Approach to International Law', *Max Planck Encyclopedia of Public International Law* (2010); Charlesworth, above note 89, 407–9.

[124] Charlesworth and Chinkin, above note 123, 60.

by men'.[125] It is argued that this would benefit not just women but also allow the major aims of the UN Charter 'to be defined in new, inclusive, ways'.[126]

Feminist theory has had some influence and success within the international system. The advancement of women has been given institutional support through the UN system, in particular through the Committee on the Elimination of Discrimination against Women (CEDAW), a body dedicated to investigating human rights abuses committed against women, and improving the human rights of women worldwide. Other examples are reflected in the area of international war crimes prosecutions, where radical developments have occurred in relation to both the role of women in armed conflict, and the recognition and more appropriate criminalizing of massive human rights violations against them as a group.[127]

1.5 SPECIALIST AREAS OF INTERNATIONAL LAW

1.5.1 The International Law of the Sea

The international law of the sea is the body of public international law concerned with defining permissible maritime activities, navigational rights, mineral rights, jurisdiction over coastal waters and the relationship between states and the seas.

From the seventeenth century until the mid-twentieth century, the international law of the sea was dominated by the concept of 'freedom of the seas' as promoted by Grotius in his Latin text, *Mare Liberum*.[128] During this time, states enjoyed freedom to pursue their interests unhindered in all areas of the sea, save for the three nautical miles from a state's coastline,

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125 Ibid., 61.

126 Ibid.

127 See Charlesworth and Chinkin, above note 123, 330: 'The jurisdiction and emerging jurisprudence of the *ad hoc* Tribunals suggest that the silence about the suffering of women in all forms of armed conflict has been broken', and at 333: 'All these developments suggest that the international legal system has responded well in taking women's lives into account in the context of international criminal law. In some ways, however, the response has been very limited.'

128 Hugo Grotius, 'The Freedom of the Seas or The Right Which Belongs to the Dutch to Take Part in the East Indian Trade' (Ralph van Demen Magoffin trans., New York, Oxford University Press, 1916) [translation of *Mare Liberum* (1609)]; Edward W. Allen, 'Freedom of the Sea', (1966) 60 *American Journal of International Law* 814, 814.

which remained within the control of the coastal state (otherwise known as the 'cannon shot' rule).

This absolute freedom of activity began to give way as a result of a number of factors – which included a shift in geo-political priorities, the desire to extend national claims, concerns regarding the exploitation of the seabed's resources, protection of marine environments and fish stocks, and enforcement of pollution controls, migration laws and counter-terrorism. States began to conclude various lesser treaties to regulate limited aspects of maritime activity.[129]

The key milestone came in 1958 with the first United Nations Conference on the Law of the Sea in Geneva that aimed to produce a codification of the customary international law of the sea. It resulted in a series of multilateral treaties on the territorial sea and contiguous zone,[130] the high seas,[131] fishing and environmental conservation in the high seas,[132] the continental shelf,[133] and an optional protocol concerning the compulsory settlement of disputes.[134] However, the success of the conference was limited as states were able to pick and choose which conventions to participate in, with most ignoring the optional protocol, leaving the international law of the sea in a state of disunity. These issues remained unaddressed at the conclusion of the second United Nations Conference on the Law of the Sea, which failed to garner the necessary majority to effect any more than two minor procedural changes. This was changed, however, by the third and final United Nations Conference on the Law of the Sea, convened with an ambitious agenda and concluded in 1982. The result was a convention encompassing a range of rights and obligations – the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[135] Participation in the convention is

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[129] Such as the Convention for Regulating the Police of the North Sea Fisheries, 6 May 1882, 160 CTS 219; and the Convention for the Protection of Submarine Cables, 14 March 1884, 163 CTS 391.

[130] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

[131] Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

[132] Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

[133] Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

[134] The Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 169.

[135] United Nations Convention on the Law of the Sea (adopted 10 December

'all-or-nothing'; to opt into the convention is to accept all entailing rights and obligations. With more than 160 ratifications,[136] the convention is arguably one of the most successful examples of customary law codification and international law-making.

The UNCLOS provides for compulsory dispute resolution through the International Tribunal for the Law of the Sea (ITLOS).[137] It prevails over the 1958 Conventions,[138] although where a party is not an UNCLOS signatory but is a signatory to the 1958 Convention, the 1958 Convention will prevail. Where a party is not a signatory to any convention, then the UNCLOS serves only as a source of customary law in the case of a dispute.[139]

A final note on the operation of the UNCLOS is its careful delimitation of areas of sea, and the apportioning of rights and obligations attached. The fundamental guiding principle is that the 'land dominates the sea' so that any delimitations of the sea are made with reference to the land territory of the coastal state.[140] Such delimitations include the continental shelf, the Exclusive Economic Zone (EEZ), the contiguous zone, archipelagic waters, territorial seas and internal waters. Internal waters are treated as territorial land.[141] The territorial sea, in most cases, constitutes the area of sea within 12 nautical miles measured from the coastal state's baselines.[142] The coastal state may exercise its sovereignty within this area, albeit subject to the right to innocent passage by vessels (although this may be suspended by the state if it deems it necessary for security reasons). The contiguous zone extends a further 12 nautical miles from the territorial sea.[143] In the contiguous zone a state may continue to set and enforce rules regarding pollution, taxation, customs and immigration. The EEZ covers an area of 200 nautical miles from the

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1982, entered into force 16 November 1994) 1833 UNTS 397 (hereinafter 'UNCLOS').

136 United Nations, 'Chronological Lists of Ratifications of Accessions and Successions to the Convention and the related Agreements as at 15 November 2010', The United Nations, 15 November 2010, available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

137 UNCLOS, above note 135, Pt 15, Arts 279, 280, 281 and 284.

138 Ibid., Art. 311(1) states: 'this Convention shall prevail, as between the States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958'.

139 Triggs, above note 103, 270.

140 Shaw, above note 4, 553.

141 See Chapter 6.

142 UNCLOS, above note 135, Arts 2, 3.

143 Ibid., Art 23.

baseline,[144] within which the coastal nation has exclusive rights to the exploitation of natural resources. Finally, the continental shelf is a geological ledge projecting from the continental land mass into the sea, covered by a typically shallow body of water. Where the continental shelf extends beyond the EEZ, it may correspondingly extend the area of state control up to a maximum of 350 nautical miles from the baseline of the coast.[145] Any areas of sea beyond the scope of state control are known as the high seas and are not open to acquisition by occupation by any state.[146]

1.5.2 International Trade Law

Public international trade law addresses the rules and customs regarding trade between states. For the most part, this area of law is governed by bilateral agreements, many of which exist beneath the overarching multilateral framework formed by the World Trade Organization (WTO)[147] (encompassing the General Agreement on Tariffs and Trade (GATT) 1947,[148] and the GATT 1994[149]). The WTO is based around principles of elimination of trade barriers and non-discrimination between trading states.[150]

This global approach to trade found its impetus in the ruins of the Second World War. As the Allies set about the task of rebuilding a devastated Europe and ensuring that such wars never occurred again, it was suggested that a liberal model of free trade would eliminate economic instability, which was considered to be one of the factors that leads to regional conflict. Accordingly, the GATT 1947 was established, providing an informal framework for international trade until its replacement by the WTO in 1995. The original GATT 1947 remains operational within the WTO structure, subject to the GATT 1994 amendments.[151]

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144 Ibid., Arts 55, 57.

145 Ibid., Art. 76(1).

146 Ibid., Art. 86; Ian Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 2008, 7th edn), 224.

147 Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (hereinafter 'the WTO Agreement').

148 General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194 (hereinafter 'GATT 1947').

149 General Agreement on Tariffs and Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization (adopted for signature 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (hereinafter 'GATT 1994').

150 Ibid., Arts 1(1), 3(1) and 11(1).

151 Ibid., Art. 1(b)(ii).

The fundamental aim of the WTO Agreement is the establishment of trade relations with a view to raising standards of living, ensuring full employment, increasing trade, pursuing an increase in trade and effective use of resources, sustainable development and environmental protection, in a manner consistent with the needs of different states.[152]

Similar to the UNCLOS, parties to the WTO Agreement are assenting to all annexed agreements. There are, however, some allowances for special agreements and measures for certain developing countries.[153]

By far the most significant development in international trade law has been the establishment of extensive and sophisticated procedures for the settlement of disputes under the WTO, in the form of the Dispute Settlement Understanding (DSU).[154] The DSU has extraordinary powers to hear disputes and impose decisions that are binding on all Member States. In the first ten years since its introduction, the number of disputes heard under the DSU exceeded the combined total of disputes heard by the International Court of Justice and the Permanent Court of International Justice in 85 years.[155] These statistics are a credit to the DSU as a powerful and compelling procedure for dispute resolution.

1.5.3 International Environmental Law

The issues of environmental management and transnational pollution pose unique and serious challenges to the international community. An increased awareness of risks to the environment in recent times has prompted a spate of bilateral, regional and multilateral measures targeting a wide range of areas from terrestrial to atmospheric pollution, wildlife conservation and sustainability.[156] Yet, because approaches to these issues are often informed by human and social priorities, disagreements about the level of responsibility of different states and the right to development,

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152 WTO Agreement, above 147, preamble.

153 Ibid., Arts 11(2) and 20.

154 WTO Agreement, above 147, Annex 2.

155 Triggs, above note 103, 697.

156 For example, the Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47; Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 145; the ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' in ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session', UN Doc A/56/10(2001), adopted by the General Assembly in Res. 58/84, 12 December 2001; the UNCLOS, above note 135.

international environmental law lacks the focus and consensus seen in other areas of international law.[157]

The lack of a commonly accepted definition of 'environment' proves the first barrier to effective international action. 'Environment' was defined in the 1972 Stockholm Declaration as 'air, water, land, flora and fauna and especially representative samples of natural ecosystems'.[158] It has been noted, however, that no single definition of 'environment' exists, and its meaning often changes depending on the context in which it is used.[159]

The development of environmental law is guided by a number of general principles common to other areas of international law, such as sovereignty and state responsibility.[160] Other principles more specific to the area of environmental law include the precautionary principle, the concept of sustainable development, the polluter pays principle, common but differentiated responsibilities, and the common heritage principle.[161] The following provides an outline of some of the key recent developments in international environmental law.

The United Nations Framework Convention on Climate Change (UNFCCC), which opened for signature in 1992 at the Earth Summit in Rio de Janeiro, aimed to achieve 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[162] The approach taken critically emphasizes mitigation rather than cessation of pollution emission.

Following the Earth Summit, the international community yet again convened in Kyoto in December 1997, resulting in the Kyoto Protocol.[163] Exemplary of the differentiated responsibilities principle, developed countries agreed to reduce their aggregate levels of greenhouse gas emissions below 1990 levels by an average of 5.2 per cent during the period 2008 to

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157 Brownlie, above note 146, 275.

158 Declaration of the UN Conference on the Human Environment, 16 June 1992, UN Doc. A/CONF/48/14/REV.1, Principle 2.

159 Patricia Birnie and Allan Boyle, *International Law and the Environment*, (Oxford: Oxford University Press, 2002, 2nd edn), 3–4.

160 *The Trail Smelter* (*United States v Canada*) *Arbitration* (1938–41) 31 RIAA 1905.

161 See, generally, Brownlie, above note 146, 276–80.

162 United Nations Framework Convention on Climate Change (adopted 4 June 1992, entered into force 21 March 1994) 1771 UNTS 164, Art. 2 (hereinafter 'UNFCCC').

163 Protocol to the Framework Convention on Climate Change (opened for signature 11 December 1997, entered into force 16 February 2005) 37 ILM (1998) 22 ('Kyoto Protocol').

2012, while developing states were not bound to any particular reduction targets.

Since Kyoto, numerous conferences have been held in various places including The Hague, Copenhagen and Cancún. The running theme in the development of this vein of international law is the milieu of diverging interests and priorities. Developing states assert a right to prioritize their economic development and to increase their standard of living, demanding that developed states take responsibility for their historical contribution to transnational pollution. On the other hand, developing states are called upon to take responsibility for their projected future contributions. True cooperation will be difficult to attain at present, given the reluctance of global powers such as China and the United States to commit to binding targets. These disputes will continue to pose a major hurdle to effective international law-making in the future.

1.5.4 International Humanitarian Law

International humanitarian law (also known as the laws of war or the law of armed conflict)[164] emerges chiefly from the concept that conflict, being an inexorable part of human nature, is inevitable, and hence efforts should be made to create reasonable guidelines of conduct and to mitigate harm.[165] Primarily derived from international conventions,[166] it regulates the conduct and obligations of belligerent nations, neutral nations and individuals engaged in war. It also provides for the status and treatment of protected persons such as civilians.[167]

Much of international humanitarian law has been codified in the four Geneva Conventions of 1949,[168] which operate subject to amendments in

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[164] Shaw, above note 4, 1167.

[165] Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Leyden: Sijthoff; Geneva: Henry Dunant Institute, 1975), 30.

[166] It has been suggested that international customary law principles exist over and above conventional rules. See Shaw, above note 4, 1167; and Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *American Journal of International Law* 817.

[167] Some discussion of the history of IHL can be found above at section 1.3.1. A more detailed discussion can be found in Boas et al., above note 42, Chapter 4, section 4.1.2.

[168] The four Geneva Conventions of 12 August 1949, which entered into force on 21 October 1950 are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 ('Geneva Convention I'); (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at

a further three protocols.[169] Today, the Conventions have an essentially universal participation rate, with 194 parties.[170]

In determining the applicability of the Geneva Conventions to a conflict, much rides on the characterization of the conflict. Common Articles 2 and 3 stipulate that the Conventions operate in relation to declared war or armed conflicts between nations that have ratified the Conventions.[171] Situations lacking the character of an 'armed conflict' would fall outside the scope of the Conventions. Similarly, if the armed conflict lacks an 'international character',[172] the Conventions will not apply, save for a list of minimum rules of war contained in Article 3.

The Geneva Conventions are supplemented by an extensive body of customary international law, which together give rise to a series of important principles relating to the protection of persons not directly participating in an armed conflict. These principles include the distinction between combatants and non-combatants, the prohibition on indiscriminate attacks, the requirement for proportionality in attacks, the respect and protection to be afforded to prisoners of war, and the prohibition of torture, medical experimentation and neglect endangering health.[173]

1.5.5 International Human Rights Law

International human rights law rests upon the foundation of universalism and egalitarianism and can trace its history back to the natural law philosophies of Roman Law. Its premise is that all humans are 'born free

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Sea, 75 UNTS 85 ('Geneva Convention II'); (3) Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 ('Geneva Convention III'); (4) Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 ('Geneva Convention IV').

[169] Protocol Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol relating to the Protection of Victims of Non-International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609; Protocol relating to the Adoption of an Additional Distinctive Emblem, conclusion date 8 December 2005 (not yet in force).

[170] International Committee of the Red Cross, 'Geneva Conventions of 12 August 1949' (2005), available at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P.

[171] Geneva Conventions, common Arts 2 and 3.

[172] For a discussion of the customary rules of IHL, see generally the customary law study of the International Committee of the Red Cross: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

[173] Ibid.

and equal in dignity and rights',[174] and are entitled to the protection and promotion of such rights. The human rights movement was galvanized in the wake of the atrocities of the Second World War.

The modern law of international human rights was founded upon the Universal Declaration of Human Rights 1948 (UDHR).[175] In strict terms it is a weak legal instrument and was never intended to be binding. Nevertheless the UDHR formed the platform for the promotion of such principles as the prohibition against slavery,[176] non-discrimination[177] and the right to life,[178] which provided a basis for the development of other related treaties. Such treaties include the International Covenant on Civil and Political Rights,[179] the International Covenant on Social and Cultural Rights,[180] the Convention against Torture,[181] the UN Convention on the Rights of the Child,[182] the Convention on the Elimination of All Forms of Racial Discrimination[183] and the Genocide Convention.[184]

Regional human rights treaties have followed, similar in form and function to the UN multilateral treaties. The UN also possesses the means to encourage compliance with human rights treaties at a domestic level through the Human Rights Council.[185] Particular areas of international human rights law are undergoing rapid change. The concept of human rights is becoming an increasingly extraterritorial one, while the notion of state responsibility to prevent human rights abuses is gaining traction.[186]

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[174] Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 at 71, Art. 1 (hereinafter 'UDHR').

[175] Ibid.

[176] Ibid., Art. 4.

[177] Ibid., Art. 2.

[178] Ibid., Art. 3.

[179] GA Res. 2200A (XXI) 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), entered into force 23 March 1976.

[180] International Covenant on Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[181] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987)1465 UNTS 85.

[182] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[183] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

[184] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[185] General Assembly, Resolution on the Human Rights Council, GA Res. 60/251, UN GAOR, 6th sess., 72nd plen. mtg, UN Doc. A/RES/60/251 (2006).

[186] Shaw, above note 4, 276.

Furthermore, human rights law is becoming increasingly merged with international humanitarian law.

While the precise nature and role of international human rights law is the subject of uncertainty,[187] it is clear that international human rights law presents a new and dynamic front for the influence of international law to effect change in human interactions; its role, function and impact on the place of the individual in international law will be considered often in this book.

1.5.6 International Criminal Law

At the core of international criminal law are the concepts that individuals can be responsible for international crimes, that aggression is illegal, and the acknowledgement that international law has a role to play regarding criminality and armed conflict. International criminal law primarily deals with war crimes, genocide, crimes against humanity and possibly crimes against peace. The purpose of individual responsibility in international criminal law is to capture all of the methods and means by which an individual may contribute to the commission of a crime, or be held responsible for a crime under international law.[188]

Generally speaking, international criminal law provides an enforcement mechanism for the obligations and prohibitions created by international humanitarian law. Enforcement is by way of penal sanctions and may be achieved through reliance on domestic or international mechanisms.

Until the end of the Second World War, the concept of international crime was not well developed. Piracy and slave trading were arguably the only recognized crimes against international society. Provided that the accused was apprehended on the high seas or within the territory of the prosecuting state, states had universal jurisdiction to prosecute individuals for these crimes, regardless of the nationality of the accused or where the alleged crimes were committed.

After the First World War, the Treaty of Versailles provided for the punishment of German individuals who had violated the laws and

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[187] Ibid., 265.

[188] See Gideon Boas, James L. Bischoff and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007), Chapter 1; see examples of this expressed in case law: *Prosecutor v Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 11 September 2006, [459]–[460]; *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, 14 June 2004, [267]; *Prosecutor v Delalić, Mucić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) [321], [331].

customs of war – although only a few trials were actually held and within Germany itself.[189] Provision was also made to try Kaiser Wilhelm II before an international tribunal for 'a supreme offence against international morality and the sanctity of treaties'.[190] The clause was, however, never executed given that the Kaiser fled to the Netherlands, which refused to extradite him. It was only following the atrocities of the Second World War that the moral imperative to create an international tribunal was recognized. The first real international criminal tribunal was the Nuremburg Tribunal, created to prosecute prominent members of the German Nazi leadership.[191] The tribunal reasoned that its criminal findings were merely expressions of pre-existing customary international law, although some commentators have questioned the legal basis of this position.

The Nuremburg Tribunal affirmed numerous principles of international criminal law, including the rejection of the defence of superior orders and the criminality of aggressive war.[192] It also laid the foundation for the establishment of numerous subsequent international criminal tribunals, and prompted calls for a permanent international criminal court. Most of the subsequent tribunals have been specifically established in response to particular conflicts. For example, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were both ad hoc tribunals created by the United Nations Security Council,[193] and were followed by a host of internationalized (or hybrid) tribunals dealing with specific conflicts – for example, in East Timor,

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[189] Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol [1920] ATS 1 ('Treaty of Versailles'), Art. 228; C. Mullins, *The Leipzig Trials* (London: H.F. & G. Witherby, 1921). For a discussion of the abortive post-First World War trials, see Boas et al., above note 42, Chapter 2, section 2.1.1; Timothy L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague and Boston, MA: Kluwer Law International, 1997).

[190] Treaty of Versailles, above note 189, Art. 227.

[191] Allied Resolution on German War Crimes, *Inter-Allied Revue*, 15 January 1942.

[192] Shaw, above note 4, 400.

[193] Established by UN Security Council, Resolution 827 (1993), adopted by the Security Council at its 3217th meeting on 25 May 1993, S/RES/827 (1993), available at http://www.unhcr.org/refworld/docid/3b00f21b1c.html; and UN Security Council, Security Council Resolution S/RES/955 (1994), 8 November 1994, S/RES/955 (1994), available at http://www.unhcr.org/refworld/docid/3b00f2742c.html.

Sierra Leone and Cambodia.[194] In 2002, the International Criminal Court (ICC) was created.[195] The ICC is set up as a permanent court to prosecute individuals for international crimes. As of October 2010 the ICC has 114 member states, with a further 34 signatory countries that have yet to ratify the treaty. Importantly, a number of major states, including the US, China and India are not signatories to the Rome Statute. The absence of these states poses a significant problem to the legitimacy of ICC jurisdiction.

1.6 WHAT IS INTERNATIONAL LAW?

International law is primarily conceived of as a system of law that regulates the conduct of, and between, states in the exercise of their external relations with other states. The development in the relations between states, globalized trade, rules relating to recourse to armed conflict, and the increasing role of non-state institutions in the development and indeed creation of international law, means that it is no longer possible to simply talk of the 'law of nations' as synonymous with international law.

Before examining in detail the core principles that embody contemporary public international law in the remainder of this book, there is a key question that must be addressed: what is international law? This is at once a crucial, and a meaningless, question. All of the theories discussed or referred to already in this chapter offer some conception or perspective of what is international law. Many scholars have addressed this question, most acknowledging that it is a highly perplexing and subjective one.[196] Nonetheless, a book about international law can hardly avoid such a discussion.

A preliminary aspect to this question is whether international law as such even exists. Scholars at various periods have questioned the existence

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[194] For a discussion of international criminal law, its institutions and functioning, see generally Gideon Boas, James L. Bischoff, Natalie L. Reid and B. Don Taylor III, *International Criminal Procedure* (Cambridge: Cambridge University Press, 2011); Boas et al., above note 42; Boas et al., above note 188; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007); Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008, 2nd edn).

[195] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[196] See, generally, Shaw, above note 4, 43–68; Kelsen, above note 45, 321–33; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht; London: Martinus Nijhoff Publishers, 1991), 1–16; Higgins, above note 48, 2–12.

of international law at all, postulating that what we call international law is really no more than a system of international relations, lacking core aspects of a legal system as such.

H.L.A. Hart, for example, had this to say:

> [T]he absence of an international legislature, courts with compulsory jurisdiction, and centrally organised sanctions have inspired misgivings, at any rate in the breast of legal theorists. The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. It is indeed arguable . . . that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question 'Is international law really law?' can hardly be put aside.[197]

A more recent and dangerous challenge to the existence, or at least legitimacy, of international law comes from critical legal studies. Simplistically put, this conception of international law sees it as essentially contradictory, invariably imbued with the social and political such that it cannot resolve crucial questions posed of it.[198] This view of international law recalls the positivism of John Austin, whereby international law is ostensibly the dictate of states and subject to the paradigms of power and control[199] – a paradigm in which powerful states hold all the cards. Such a perspective precludes a normative system of rules that can be legally defined, determined and developed.[200] Gerry Simpson explains Austin's conception of international law as essentially anarchic:

> Debate about the compatibility of law and anarchy is a permanent feature of the intellectual landscape in international law and relations. The question: 'Is international law, law?' derives from an assumed mismatch between conditions of anarchy and the existence of law. John Austin famously questioned the existence of public international law on precisely these grounds. In the

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197 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 209. For a discussion of Hart's statement, see Triggs, above note 103, 3. See also, J.L. Brierly, *The Outlook for International Law* (Oxford: Clarendon Press, 1944), 13; Thomas M. Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705, 706.

198 See for example, Koskenniemi, above note 105.

199 See also Brierly, above note 197.

200 See the development of these issues in Franck, above note 197.

> absence of a single over-arching world sovereign how could there be law among sovereigns?[201]

Thomas Franck defends the system of international law, while acknowledging that its defenders have been less than convincing:

> Why study the teleology of law? What are laws *for?* What causes obedience? Such basic questions are the meat and potatoes of jurisprudential inquiry. Any legal system worth taking seriously must address such fundamentals. J. L. Brierly has speculated that jurisprudence, nowadays, regards international law as no more than 'an attorney's mantle artfully displayed on the shoulders of arbitrary power' and 'a decorous name for a convenience of the chancelleries.' That seductive epigram captures the still dominant Austinian positivists' widespread cynicism towards the claim that the rules of the international system can be studied jurisprudentially. International lawyers have not taken this sort of marginalization lying down. However, their counterattack has been both feeble and misdirected, concentrating primarily on efforts to prove that international law is very similar to the positive law applicable within states. This strategy has not been intellectually convincing, nor can it be empirically sustained once divine and naturalist sources of law are discarded in favor of positivism.[202]

It is tempting to sweep aside theoretical perambulations about the existence or otherwise of international law as anachronistic. A pragmatic response to the debate might be to point to the explosion of international institutions and courts that are more or less universally recognized as creating, determining and/or applying 'international law'. The point is implicit in Franck's rhetorical questions: 'Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?'[203] If it is not international law then it is something so profoundly reflecting law in practice – and so clearly accepted as such by its subjects – that the question itself appears now to be nothing more than an abstraction. At the risk of being dismissive, to now question the existence of international law as a legal – and not purely political and social – system is to challenge the obvious. A century ago, Nys put it passionately, if not a little melodramatically: 'Law even if broken, even if

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[201] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge; New York: Cambridge University Press, 2004), 63.

[202] Franck, above note 197, 706. See generally, Anthony D'Amato, *International Law: Process and Prospect* (Dobbs Ferry, NY: Transnational, 1987).

[203] Franck, above note 200, 707.

crushed under foot, is none the less law'.[204] Indeed, the recent notorious practice of the United States in relation to its Guantanamo Bay detention facility has exemplified how law crushed under foot is still law, and how threatening essential aspects of the international law system can give rise to a set of reactions and counter-reactions that reinforce its intrinsic value and character.

Another strong argument in favour of the existence of international law comes from even a cursory examination of history.[205] As Korff noted:

> The fact that the fundamental principles of international law intercourse always were and are even in our day identical all over the world . . . justifies the theory that international law is a necessary consequence of any civilization.[206]

If this was true in 1924, surely the extraordinary development of international law norms and institutions since makes it even truer today.

To assert that international law exists does not, however, answer the question of what it is. Rosalyn Higgins' view of international law is that of a normative system, rather than simply a system of rules that must be identified and applied to the exclusion of the 'extralegal', notably social and political factors.[207] This pragmatic view of international law stands in contrast to the more traditional, positivist view that sees international law as the ascertainment of objective rules, free of the interference of these 'extralegal' factors.[208]

In her book, *Problems and Process*, Higgins enters into a kind of dialogue with Martii Koskenniemi, with whom she disagrees. She views the argument – that where international law does more than apply rules, it risks opening itself to criticism as biased and partial, and open to the control of the powerful states – as overly simplistic. In certain crucial respects, international law is the same as domestic law; the social purpose of law is to regulate the behaviour and conduct of people and institutions

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[204] Nys, above note 2, 3.

[205] See discussion above at section 1.3.

[206] Korff, above note 2, 248.

[207] See the views of Judges Fitzmaurice and Spender in the *South West Africa* cases (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) [1962] ICJ Rep 319, 466 (joint Dissenting Opinion). These views have, according to Higgins, been revived and developed in the more recent work of Martti Koskenniemi: see *From Apology to Utopia*, above note 105; 'The Politics of International Law' (1990) 1 *European Journal of International Law* (cited in Higgins, above note 48, 9).

[208] See discussion of legal positivism above in section 1.4.2.1.

within a community for the common good.[209] There is discretion involved in all aspects of international law (as in all law), and to ignore a moral aspect to its identification, determination and application is naive, unrealistic and unnecessary.[210] Higgins makes a further – and important – point: by refusing to acknowledge the political and social factors involved in determining international law, we risk hiding what is a natural and inevitable aspect of the process.[211]

There is a distinct attraction to Higgins' conception of international law – for a start, it is an answer to the reductive perspective that critical theory brings to international law. An additional point needs, however, to be made about Higgins' approach. International law as a normative system that can be legitimately developed in the decision-making of institutions, as well as courts and tribunals, requires not just an openness about external influences (political or social) on decision-makers. A further step in reasoning needs to be made. It also demands an openness (and honesty) about the limitation of those rendering decisions and developing this law. One of the great myths of judicial decision-making, for example, is that judges, because they are professionals, are unaffected by context or emotion and are dispassionately discovering and applying defined rules, even if they are aware of and acknowledge the political and other extralegal contexts in which such decisions are made. The fiction of this position exists in all systems of law but is no better exposed than in the context of international criminal tribunals. An honest discussion about the competence, capacity and even integrity of these decision-makers is long overdue. Once again, this theme will re-emerge at different points throughout this book.

One point of departure between Higgins and Koskenniemi relates to the extent to which international law is equipped to resolve contradictions. For Higgins, one can make a rational choice between conflicting or contradictory principles or perspectives by making determinations for the 'common good'.[212] Rules are just past decisions of organs and courts; if international law is simply about finding and applying the law (formalism) then it cannot, in Higgins' view, contribute to and cope with a changing political world. Judges, legal advisers and others are not simply finding the rule in relation to a particular issue – part of their role is to determine what

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[209] Higgins, above note 48, 2. She notes that most law, including international law, has nothing to do with the settlement of disputes – which is a discrete aspect of all legal systems.

[210] Ibid., 7.

[211] Ibid., 48.

[212] Ibid., 9.

the rule is and, in doing so, be aware of political and social context.[213] To Koskenniemi, such determinations require a foray into extralegal social and political matters not properly the domain of law; they also require choices to be made about the assertion of certain rights over others – and how does one exercise this choice?[214] An adherence to formal rules, he argues, lends greater protection to the rule of law and is better placed to protect the 'weak' in international law: 'from the instrumentalist perspective, international law exists to realize objectives of some dominant part of the community; from the formalist perspective, it provides a platform to evaluate behaviour, including the behaviour of those in dominant positions'.[215]

Koskenniemi views formalism as creating an objective basis for the achievement of the ultimate aims of international law, even if (or perhaps because) they reflect inflexible rules that are more resistant to political power paradigms:

> [I]nternational law exists as a promise of justice. The agnosticism of political modernity has made the articulation of this teleological view extremely difficult. For the justice towards which international law points cannot be enumerated in substantive values, interests, or objectives. It has no predetermined institutional form. All such languages and suggestions express inadequate and reified images, (partial) points of view. Even when acceptable in their general formulation, as soon as such principles are translated into particular policies, and start to prefer some interests or values over others, they become vulnerable to the critique of 'false universalism'.

Even if '[a] court's decision or a lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated by external criteria',[216] one response to such a concern is: so what? The creation and interpretation of all law is in part an expression of both the internal and external influences upon the people forming opinions and rendering decisions. Whether considered through the prism of formalism (adherence to rules) or normativism (adherence to values and objectives based, say, on the idea of legitimacy), somebody makes the rules and somebody interprets, applies, ignores and reformulates them. Such is the nature of all human interaction. Any international lawyer who suggests that his or her discipline is somehow immune from this is quite misdirected.

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[213] Ibid., 2–3.

[214] Ibid., 9–10, referring to the works of Koskenniemi cited at above notes 105 and 207.

[215] Koskenniemi, above note 62, 68–9.

[216] Ibid., 72.

These are important issues and reflect deep divisions in the understanding of the international legal system and what it can achieve. Whatever the theoretical lens through which one views international law, it is essential always to ask how it is to be conceptualized and applied to real problems. Theoretical debate about what international law is and whether it should be interpreted strictly as a defined set of legal rules exclusive of political context, or as a process that engages the inevitable extralegal context that a decision-maker must account for, are important questions. Positivism, formalism, instrumentalism, realism and other theoretical conceptions will continue to influence the debate about what is international law. One is left, however, with the sense that modern international law operates very much as a normative system of rules that can be ascertained and applied by courts and other institutions within its political and social context. Even Koskenniemi acknowledges, when considering 'what is international law for', that notions of 'peace', 'security' and 'justice' are acceptable notions of the purpose of international law, even if only because 'of their ability to gloss over existing disagreement about political choices and distributional priorities'.[217] Higgins' international law is an international law 'harnessed to the achievement of common values'[218] – a universal, all-embracing system that transcends rules complied with or breached. It is flawed to be sure, but nonetheless it is a normative system capable of delivering such abstract notions as peace, security and justice. Of course, the temptation towards the interpretation of international law as instrumentalism, as a normative system, as a pragmatic response to the question of what is international law, carries with it a set of problems beyond the theoretical. In examining the core principles of international law, this book will reveal how fraught and complex can be the application of international law in a world of competing needs and interests.

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[217] Ibid., 58.
[218] Higgins, above note 48, 1–2.

2. International law-making: the sources of international law

In a national legal system, the identification of legal rules and their sources is a more or less straightforward process. While legal systems may differ in the way their vertical systems of rule-making function and apply (for example, common law systems will show a greater reliance on common law precedent than civil law systems, which rely on greater codification and eschew the operation of a doctrine of binding precedent), there is always a clear hierarchy to the sources of law. This hierarchical structure also lends a degree of certainty, stability and predictability to the legal process, in which the roles of the different institutions involved make the ascertainment of rules easier.

This certainty, stability and predictability can be sharply contrasted to the international law system, which has no single legislature, no executive and a disparate network of *sui generis* courts and tribunals that apply international law specific to their differing jurisdictions. This aspect of international law has 'inspired misgivings, at any rate in the breast of legal theorists'[1] and renders crucial the task of articulating what the sources of international law are and how they operate to guide and bind its subjects.

This chapter concerns the source of obligation in international law – the critical element that renders international law more than a system of international relations between states and other subjects. After discussing consent, obligation, fragmentation and the potential for conflicting norms within international law, this chapter will turn to Article 38(1) of the Statute of the International Court of Justice ('ICJ Statute') – a material source of almost constitutional significance, in the sense that its articulation of the sources of international law are universally accepted and applied. The primary sources of international law will then be examined: international conventions, or treaties; customary international law (including *jus cogens* and obligations *erga omnes*) and general principles

[1] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 209, where he raises the question 'Is international law really law?' This aspect of international law, and Hart's view, is discussed in Chapter 1, section 1.6.

of international law, as will the subsidiary sources of judicial decisions and the opinions of highly regarded publicists. As with all chapters in this book, contemporary issues and case studies will be discussed as they arise and the chapter will consider whether other sources of international law exist, outside the paradigm of Article 38 and its traditional interpretation.

2.1 THE SOURCE OF OBLIGATION IN INTERNATIONAL LAW

2.1.1 Derivation of the Sources of International Law and the Question of Hierarchy

Article 38(1) of the ICJ Statute authoritatively states that the sources of international law are (1) treaties, or conventions; (2) customary international law, or the consistent practice of states undertaken in the belief that the conduct is permitted, required or prohibited by international law; (3) the general principles of law recognized by and typically derived from the domestic legal systems of states; and, (4) as a subsidiary source, commentaries in judicial decisions and academic writings of the 'most highly qualified publicists'.[2]

International lawyers draw a distinction between 'formal' and 'material' sources of law. Formal sources are those giving a particular norm its validity or authority – treaty, custom and general principles. Thus, the reason why the Nuclear Test Ban Treaty is legally binding is that it is a norm laid down through the process of treaty-making. The prohibition on the commission of crimes against humanity, and the rights and obligations relating to the prosecution by states of offenders, is as a result of the existence of a rule of customary international law on the issue. The reason why *lex specialis derogat legi generali* (special words prevail over general words) applies to help to interpret a treaty,[3] or why circumstantial evidence may be relied upon in international law,[4] is because these are accepted general principles of international law.

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[2] Statute of the International Court of Justice, Art. 38(1).

[3] See, e.g., International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006), Conclusion (5), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf ('Fragmentation Report').

[4] See *Barcelona Traction, Light and Power Company Ltd* (*Belgium v Spain*) [1970] ICJ Rep 3, 39.

Material sources, on the other hand, reflect evidence that may be referred to in order to prove that a particular norm has a formal source. For example, the UN Charter is a material source that evidences the content of the important treaty law it represents. The practice of states and their belief about that practice (*opinio juris*) are material sources for the proposition that particular customary norms exist – indeed, they are critical elements that establish the existence of such a norm. A piece of evidence can be used as a material source without regard to whether the source is itself norm-creating. Hence, judicial decisions and the writings of publicists, as subsidiary sources of law, can be relied upon to help form an opinion about whether a rule exists.

It is sometimes said that there is no 'hierarchy' among the formal sources of international law, in the sense that neither treaty, nor custom, nor general principles take precedence over each other. This contributes to the perception of international law as a horizontal, anarchic system of law without a sovereign that makes laws to which all members of the community of states must abide. This proposition is only partially true, as some norms do in practice 'trump' others. Generally, treaties and custom are hierarchically equal, in that the subsequent conclusion of a treaty will displace an inconsistent pre-existing customary norm as between the contracting parties and the emergence of a later customary norm can modify a treaty (for example, parties to a treaty may over time behave as if some of the treaty provisions are not obligatory). However, as will be discussed in detail below,[5] certain customary norms – referred to as *jus cogens* norms – are non-derogable and states may not 'contract out' of them, even by concluding a subsequent treaty.

In practice, general principles – listed after treaty and custom in Article 38(1) – perform a gap-filling function where there is no customary or treaty law on the issue, or where a principle is required to decide which hierarchically equal norm should prevail in the event of a clash.[6] Thus, treaty and custom have been said to be hierarchically superior to general

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[5] See discussion below at section 2.2.2.7.

[6] See discussion below at section 2.2.3. It has been suggested that the ICJ has at times (e.g., in the *Reparations* and *Reservations* cases) used general principles to modify a pre-existing customary law: Hersch Lauterpacht, 'Sources of International Law', in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 1975), Vol. 2, 51, 88. However, it is more accurate to say that no pre-existing custom existed on the point and the Court was laying down a principle, which became a general principle of law when states did not protest: see discussion below at section 2.2.4.1.

principles,[7] although it might also be said that the gap-filling and tie-breaking function of general principles only indicates that this formal source operates in a different way and in a different sphere from that of treaty and custom. The issue is confused further when it is recognized that some general principles, such as *pacta sunt servanda* (the principle that agreements must be kept),[8] are also customary law.

There have, at various times in the recent history of international law, been attempts to create or define 'higher' sources of international law: sources that somehow go beyond or modify the content of Article 38(1) of the ICJ Statute. For example, the International Law Commission's (ILC) 1996 Draft Articles on Responsibility of States for Intentionally Wrongful Acts attempted to establish a principle of 'international crimes of states':

> An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.[9]

This concept proved too divisive, as many states disagreed that the notion of state criminality should be part of international law.[10] Endeavours to identify some higher order of international law norms – usually derived from an over-thinking of language employed by the International Court of Justice (ICJ)[11] – have also led to conjecture as to the existence of 'fundamental principles' or principles of international 'constitutional' law that sit somehow above the accepted sources of international law.[12] Such

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[7] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005, 2nd edn), 188.

[8] See discussion of this below at section 2.2.1.2.3.

[9] Draft Articles on Responsibility of States for Intentionally Wrongful Acts 1996, Art. 19(2).

[10] For the five elements James Crawford identifies as giving rise to a criminal regime, see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge: Cambridge University Press, 2002) 18–19, 36.

[11] See, e.g., *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) [1986] ICJ Rep 14, [181] (referring to the use of force); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 28 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, [57] (referring to the relationship between municipal and international law).

[12] See, e.g., M. Virally, 'The Sources of International Law', in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan; New York: St Martin's Press, 1968) 144–5; Georg Schwarzenberger, *The Inductive Approach to International Law* (London: Stevens, 1965), 89.

endeavours to augment or alter the traditional sources of international law were dealt with by the International Law Commission as long ago as 1976:

> [I]t is only by erroneously equating the situation under international law with that under internal law that some lawyers have been able to see in the 'constitutional' or 'fundamental' principles of the international legal order an independent and higher 'source' of international obligations, in reality there is, in the international legal order, no special source of law for creating 'constitutional' or 'fundamental' principles. The principles which come to mind when using these terms are themselves customary rules, rules embodied in treaties, or even rules emanating from bodies or procedures which have themselves been established by treaties.[13]

The simple fact is that the primary sources of international law are clear and defined: they are treaty, custom, or general principles of international law. While the behaviour of some international courts and the opinion of some scholars suggests otherwise, a binding set of international rules must be rooted in one of these sources.

2.1.2 The Consensual Basis of International Law

In any national legal system, laws derive their validity from norms superior in the hierarchy. For example, the local road regulations may stipulate that drivers must carry a driver's licence at all times. The regulations, promulgated by the executive branch as delegated legislation, derive their validity from a principal Act of Parliament, authorizing the responsible Minister to make such regulations. The Act of Parliament draws its validity from the fact that the constitution of the state grants the parliament powers to legislate in respect of roads. The constitution itself derives its validity from a fundamental assumption, what Kelsen termed the *Grundnorm* (basic norm), that the constitution is supreme and valid.[14]

In international law, such a rigid and binding hierarchical structure does not exist. But it is overly simplistic to characterize national law as a vertical system that derives legitimacy from binding layers of hierarchical norms and international law as an anarchical, horizontal system of norms. There is a consensual element to both national and international legal systems and the validity of the sources of international law (treaties,

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[13] 'Draft Articles on State Responsibility', in Report of the International Law Commission on the Work of its Twenty-Eighth Session, UN Doc. A/31/10 (1976), Commentary to Article 17, [21].

[14] Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1961).