general application.[18] Moreover, they too are open to interpretation as simply evidence of customary international law. Nor, secondly—as is transparently clear—is there anything remotely resembling an executive branch as such.

Third, there is the absence of a unified judicial branch. This however is less telling and problematic. In the first place, international law has always relied on the courts of national systems as its judicial arm.[19] In the second place, prize courts (of long-standing practice), the ICJ,[20] the ICC, and assorted (multilateral) international tribunals such as the WTO Panels, lend themselves easily to proposals for the recalibration as a world judicial branch. Apart from any considerations arising from the treaties establishing these tribunals and stipulating jurisdiction, the more significant issue pertains to the "secondment" of domestic courts. Such courts are created within a particular constitutional order which prescribes and legitimates a particular distribution of law-making and law-enforcing powers among government organs, the "separation of powers" in other words. International law trades upon the status and powers of the domestic courts for its recognition and articulation, and thus opens itself for examination according to the principles of that constitutional order, including legitimacy and legality. This, of course, assuming that international law has validity and existence as a system of norms outside and independent of the domestic system. Reliance on domestic courts also invites reflection on the status of international law as a free-standing system, and its relation to constitutional order and sovereignty. Specifically, if international law emanates out of domestic courts deciding matters on the nature and limits of a state's constitutional order and sovereignty, then perhaps international law is in fact merely an extension of domestic law. It is not an independent system of law, but merely a constellation of resemblances and points of contiguity among the separate and independent constitutional orders of sovereign states.

To these observations, a patient and perceptive internationalist will no doubt caution with the words (and arguments) of Henkin:

> What matters is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in the relations between nations…. Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behaviour, whether international behaviour reflects stability and order.[21]

And inasmuch as nations do generally tend to observe precepts of international law, even without the existence of an institutional framework, Henkin argues, international law does exist as a forensic fact.[22]

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[18] And Murphy 2010, p. 104ff suggests that they have not been effective.

[19] As a leading proponent, Benvenisti 20081 and Benvenisti and Downs 2009; also Conforti 1993, p. 8 and Kumm 2003.

[20] Notwithstanding Article 59 of the ICJ Statute limiting effect of its judgments to the parties.

[21] Henkin 1979, p. 26.

[22] Henkin 1979, p. 329.

This proposition offers us several paths to follow. The first, and most immediate, would be to assess the instrumental criterion that international law does induce obedience among nations as a proposition of law. If no certain or definite rule existed by which to establish compliance or not, but perhaps some varying or shifting standard if anything, we could not truly speak of compliance. More importantly, if no proof could be offered that the obedience or compliance in question existed in spite of, or as against, present interest, then we could not truly speak of compliance. Unless we must compromise or discard our current will and wish according to the dictates of a rule, we cannot truly speak of compliance.[23] The second would be to argue that Henkin's position supports more a type of international relations theory, than international law proper. Law in a forensic and institutional sense is not necessary so long as a social or political norm—"international law"—achieves the same end.[24] The third would be to question whether the said observance of international law norms do spring from their internalisation as independently established and authoritative norms. If a state's observance actually reflects its own constitutional, legal and political exigencies, then international law might instead be better conceived as a reflective and reflexive national practice, under the domestic rule of law. In any event, underlying all three (if not more) options is the concern that the absence of that institutional component naturally associated with the presence of (modern) law points to a more serious shortcoming in international law as an instrument of law. The proposition is, in short, that the institutional frailties noted above cannot but produce or lead to instrumental ones. Those instrumental frailties speak to the quality of international law as law. In effect, this is the old shibboleth of whether international law is "law" or not.

2.1.1.2 Instrumental Frailties?

Law, at its most general and without any particular theoretic pretensions, is an instrument declaring behavioural standards, designed to control behaviour and effectively administered in doing so. Those behavioural standards prescribe the generally applicable limits of what is generally acceptable behaviour in any given society. Now, in the absence of central judicial and executive organs who declare and enforce public, uniform laws, each state is left to own devices to decide what the nature and content of the norms are, and if they will abide by them in the circumstances. And this produces uncertainty in whether a legal rule exists, if at all, and what it prescribes. There appears to be no generally applicable limits declared or recognised and enforced by any central authority.[25] The failure of the international law system to declare and articulate its norms, and to enforce them,

[23] Henkin's response to the "cynic's formula": Henkin 1979, pp. 49ff, 90ff.

[24] Henkin's response: Henkin 1979, pp. 88ff, 319ff.

[25] See e.g., Murphy 2010, esp. Chap. 3, concluding that the UNSC has often failed to accomplish its objectives of halting aggression and maintaining peace.

all in a manner analogous to and as customary in any national law system seemingly undermines its standing as law. The uncertainty in the institutional framework, namely, who declares the law, how, and in what form, together with the uncertainty whether state conduct reflects its obedience to the law or simply the state's own self-interest, translate into a perceived weakness in the normative force of international law, if not a complete absence of legal normativity.[26] In more forceful terms, international law is considered impotent, as unable to achieve its declared and intended ends. Likewise, it is considered irrelevant, as being ignored by a state when circumstances and policy objectives require otherwise. As a result, it is a short and unlaboured walk to join those in, say, the international relations camp who characterise international law as "non-law".[27] It may well be "law" in the sense of moral standards, political conventions or social customs, but it is not law in a forensic sense.

So the first branch of the problem refers to law's declaratory function: international law has difficulties articulating clearly and with certainty its normative standards, and in promulgating or publishing them. The central offender here must certainly be customary international law, as opposed to written instruments of international law, the foremost example being treaties. As we will see in Chap. 4, the accepted standard criteria to establish rules of customary international law regarding both a qualifying act of state and its supporting normative element of *opinio juris* both present seemingly insurmountable obstacles to the easy and widespread creation of general and uniform rules. Not only is there often a paucity of basic facts to work from, but the evidence which does exist is often uncertain and indeterminate. So much so that the work of commentators can give the impression of being more a declaration of aspiration and objective, *de lege ferenda*, than a declaration of clear, certain rules, *de lege lata*. Even to invoke treaties as a counterbalance offers no reassurance, as we consider in Chap. 3. Treaties are just as easily construed as contracts between states, whose particular terms are supported by only one "real rule" of international law, that being the bindingness of formal promises, *pacta sunt servanda*.[28] At their highest, they are declaratory of underlying customary international law.[29] Given the negotiation process, especially for multilateral instruments, treaty terms rarely present shining examples of legislative drafting.[30] Moreover, the nature of the instrument, whether general treaty, bilateral investment treaty, memorandum of understanding, international agreement, convention or so on, will also affect the seriousness and attention

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[26] As seen in the debates surrounding the critique of international law in Goldsmith and Posner 2005, such as Berman 2006, Symposium 2006b and Hart 1961, pp. 89–91 (yet see p. 208ff).

[27] Keohane and Nye 2000; also Byers 1999 (trying to reconcile international relations theory with international law theory) and see the historical overview of Knutsen 1997.

[28] Article 26 VCLT; Aust 2007, pp. 179–181.

[29] Aust 2007, pp. 13, 179–180; Shaw 2008, pp. 903ff.

[30] *Czech Republic v European Media Ventures SA* [2007] 2 CLC 908 (QB Comm) 917–18 (citing O'Connell, *International Law* I, p. 252; and an epigram "a Treaty is a disagreement reduced to writing"); and see Aust 2007, Chap. 13 and p. 230ff.

which a state will invest in the negotiation of and assent to terms. Yet accepting the more nuanced modern view of examining the terms of a treaty on a case-by-case basis only really works for matters remaining on a purely international plane. Where the terms of a treaty engage rules and procedures in the domestic legal system, the national, constitutional regime for law-making interposes itself. There is no presumptive legislative, law-declaring status for treaties arising from treaty terms and treaty making. Something more is required, being the constitutionally authorised transformation of treaty terms into law.

The second branch to the instrumental frailty refers to the law's normative effectiveness: international law has difficulties in enforcing its rules, and (just as importantly) in being seen to enforce them. This remains a problem even if we assume that not all laws, international and national alike, are obeyed all the time.[31] International law has no institutional structure: it has few, if any, general law courts, and no centralised enforcement mechanisms.[32] And contrast the position of international law with that of the European Union, and its cover of institutions. Nonetheless, Henkin and many other international law scholars like Franck and Brownlie, offer the counterexample of practice, and contend that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[33] That is, the habitual observance of the norms of international law (not just counting the number of violations), and the prospect of rogue nations being shunned and isolated by others, suffice to overcome any objections these ostensible problems of institution and enforcement would offer.

But habitual or tactical observance of the precepts of international law cannot, without more, serve as dispositive evidence of the normativity of international law as law. As Goldsmith and Posner argue, there is nothing in the conduct of states to distinguish on that basis those acts arising out of transient self-interest or current policy, and those compelled by legal rule.[34] Obeying our desires of the moment is not the same thing as obeying the commands of law, at least not positive law. As Hart postulated, to distinguish habitual conduct from obeying a rule, we need the addition of an internal aspect.[35] This internal point of view reveals a "rule of recognition", by which we acknowledge the bindingness of the rule over us notwithstanding our desires or interests to the contrary. Whether we actually obey the dictates of the rule or not may include other considerations, including enforcement, habit, and benefits and detriments, but these are weighted in function of the bindingness, the normative force, of the rule. And thus, *pace* Henkin, it is precisely

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[31] The enduring favourite of those who argue no general obligation to obey the law being the stop sign in the middle of a lifeless desert: see e.g., Edmunson 1998, 2004. This was not a significant issue for Hart 1961, pp. 211–215.

[32] Rao 2004 (referring to the ICJ, ITLOS, ICTY, ECtHR and WTO).

[33] Henkin 1979, p. 47; Franck 1990 and Franck 1988 (perception of legitimacy through symbolism, coherence).

[34] Goldsmith and Posner 2005, p. 185ff.

[35] Hart 1961, pp. 54ff, 98ff. Echoing (with much greater impact) what Ehrlich 2002 had already observed.

in the violations of international law that we can identify whether it possesses normativity—the compulsion to obedience—and whether that compulsion is of a forensic, or merely of a social or moral nature.[36]

A graduated, tripartite, response forms the usual rejoinder. At its most ambitious, the reply concedes the existence of a problem, and proposes reconstructing the institutional framework of both international law and national law. That is, it suggests a form of constitutionalisation at the international level, integrating current institutions (most notably the UN and the ICJ) and creating new ones. Moreover it would reconstrue statehood and sovereignty as permeable and fungible, instead of impenetrable monoliths. Thus it would meet and overcome directly the two frailties of international law. At the second level, the rejoinder distinguishes between treaties (and other written instruments under international law) and customary international law, and prefers the former over the latter.[37] The certainties and stability offered by a treaty regime, as given by many current examples from the EU to the WTO, and the receptiveness of states to maintain and observe treaty relations would seem to overcome the two frailties in large measure. The third level simply proposes altering or reinterpreting the criteria for making international law (customary international law in particular) so as to diminish the impact of or circumvent the frailties.[38] Thus the subjective element to customary international law, *opinio juris*, would not be a necessary ingredient, or could be discounted. Likewise, evidence of practice would not necessarily have to extend over any length of time, and could be justifiably expanded beyond traditional acts of state. Moreover, NGO's and other entities recognised in international law become constituent actors in the practice forming customary international law.

2.1.2 A Change of Perspective

So long as the objectives and perspectives of international law remained fixed at the level of purely interstate activities of a "public law" nature, these frailties might not be understood to pose any great problems. A continuing insulation or separation from national constitutional peculiarities would leave international law sturdy enough at an international level. But the twentieth century, right from its first decades, washed away the sand upon which this castle rested. Political, social agitation and action, matched by technological innovations, economic development and expansion, and increased ease of mobility all changed the internal arrangements of the states themselves. But they also led to significant changes to

[36] See Cohen 1996, pp. 177–181 an insightful and cogent reply to Korsgaard 1996a.

[37] Thus the tenor of Kelly 2000.

[38] See e.g., Guzman 2005; Shaw 2008, p. 74ff (and with the idea of "automatic international custom" as suggested by Bin Cheng for UN resolutions on outer space); and Lepard 2010, pp. 34ff, 224ff.

the circumstances and nature of interstate contact, prompting ultimately the neologism of "globalisation".[39] Globalisation is of course more than the actual network of economic, social and political connections across state borders. It also carries with it a change in perspective, one whose impact is most significantly felt in international law. The transnational connections defining globalisation suggest a repackaging, a reconstruction, of how public power is organised and exercised. From the national viewpoint, it invites naturally more permeable borders, and greater efforts for standardisation and regulatory cooperation. Yet from the international side, globalisation offers international law a greater and deeper foothold in regulating directly or indirectly economic, social and political matters at an internal level. The portal of transnational cooperation opens these areas to the institutions and instruments of international law, by virtue of its promise of an autonomy and independence from any one particular national legal and political system.[40] The change in perspective for international law occasioned by the twentieth century is a reinvigoration of its claim for an active role in domestic law-making.

The historical progress to what we now comfortably refer to generally as "globalisation" is well-known and often rehearsed.[41] The economic, intellectual and social momentum building up through the latter decades of the nineteenth century exploded into the political arena, demanding and producing changes to the ways political power was exercised inside the state. The perception of society and politics, as aggregated into the administrative state, sought both a greater democratic content to government while allowing it a greater managerial responsibility for all aspects of social welfare. At the same time, the more close and concrete link of social welfare and economic well-being to the political calculus required legal and political perspectives to change, as well as account for social and economic attachments traversing borders. The two world wars, and their consequences, demonstrated with clarity a lack of voice and vigour to prevent suffering instigated by political power, and on such a wide scale. This came hand in hand with a "disenchantment" (ever increasing as the century progressed), in effect the dissolution of broadly common, shared moral grounds based largely in religious (Christian) conviction, for what is in effect a sort of ethical republicanism, of a largely secular, local and subjective nature.[42] The dissolution of this presumption is evidenced not only by resurgent scholarship into reconstructing and recalibrating what now might serve just as such a common foundation—predominantly

[39] Hoffman 2005, pp. 212–213, 226ff (suggesting that the decision of Judge Alvarez in PCIJ Lotus recognised at that early stage already the pressures of globalism on international law).

[40] Delbrück 2001 (emphasising the denationalisation of law).

[41] See further, e.g., Steger 2009; Friedmann 2000 and Friedmann 2005; Stiglitz 2003, and Delbrück 1993.

[42] Taken up in and explored in a vast swathe of legal and ethical philosophy, an extremely brief cross-section of which includes McIntyre 1984 and McIntyre 1988; Berman 1983; Habermas, 1996 (establishing "constitutional patriotism"); de Been 2008, and Forst 2002; see also Brudner 2004 and Alexy 2004 (both positing a general theory of (constitutional) rights).

a humanism articulated through human rights—but also an emphasis on value positivism through treaties. Further, new technologies facilitated the transport of goods and people on land, by air, at sea, as well as of ideas, by telecoms, radio and television, and all well beyond national borders. These technologies also assisted creating new types of goods and channels of transport, such as fax and internet. Transnational transport and communication obviously required cooperation and coordination at the very least among national regulatory organs. Economic expansion, driven by technology, population, diversification, and so on, spilled more heavily over borders. This expansion also was recognised to come at a cost to the environment, whether damage by accident or through longer term changes to climate, ecology, or biotope. As the frequency, immediacy, and intensity of contacts increased among nationals of different states, so too did the impetus and need for cooperation and coordination among their respective legal and economic systems.

2.1.2.1 The Rule of Law Mindset

These forces of "modernity" or "post-modernity" manifested themselves first within the respective constitutional orders of states. It would naturally be an unwarranted oversimplification to represent these forces of change as being the driving cause of constitutional change in the twentieth century. The interdependence and symbiotic coherence among political–constitutional, social, economic and legal forces, the one influencing the other in like measure, produce the far more complex realities. Nevertheless we can trace out in broad strokes three principal developments in constitutions and constitutionalism more generally. The first has been a redoubled pressure to expand and empower the various attributes of democratic governance. Beginning with broadening the franchise, the right to vote, there followed moves to stimulate and maintain public participation in political processes, and to develop new means (or refine extant ones) for public participation. This spans a whole array of mechanisms, from creating more opportunities to vote for local and other public officials, to public outreach and consultation, through to greater attention being paid to the influence exercisable by interest groups, lobbying, or civil society groups, legislative initiatives through referenda, and such like. With this drive for a greater voice in governance—making rules and administering them—comes a renewed emphasis on the responsiveness and responsibility of public officials and institutions. The second strand is an increased demand for public, collective, protection and support of economic and social security through the instrument and institution of government. What we experience and expect in the proper management of society, as the primary task of the government, has drawn it more deeply into and in more aspects of our everyday existence. The modern state's orientation to social welfare and well-being has created the "regulatory state", represented by a complex, ever-expanding constellation of rules and procedures.

The increased volume of regulation points to an emphasis and reliance on rule-making which colours modern constitutions and constitutionalism, the third strand.

The leading image and idea to twentieth century constitutionalism has been the "rule of law", one tied very closely to active, justiciable human rights. Much has already been written, and is being composed, on the rule of law elsewhere.[43] For present purposes, a brief sketch will suffice. In its classic presentation, the rule of law serves to limit and control an orderly application of power in society. It has two branches: (1) the government ought to rule by law duly made, and (2) those making the law (specifically, the government) must comply with certain conditions and procedures in doing so. Invariably these conditions and procedures speak to democratic, representative and responsible governance. Both conditions together would check any arbitrary exercise of government power, and thus preserve individual rights and freedoms within an orderly society. In order to serve as a check and balance to public, administrative, power, the rule of law has necessarily translated or defined "state", "government", "sovereignty" and so on, in its own, legal, terms. Governments rule by instrument of law; they are themselves an instrument of law, and therefore subject to it. The ultimate source of law is prescribed by and through the constitution, as the basic, primary law.[44] So what is essential to the rule of law mindset is that power and its exercise (insofar as distinguishable) can be effectively framed in and by law. The structure of any relationship—most prominently the one of governor and governed—can be construed in terms of legal concepts and, importantly, controlled by legal process.

Indeed, what has emerged in the twentieth century is a strong tendency to juridify all social and political relations. This does not mean that society has necessarily become more litigious. It stands for more than simply an increased demand upon legislative and judicial resources by virtue of more complex, specialised regulations. It represents rather a mindset which translates constitutional, political, economic, and social issues into legal, justiciable terms. We tend to conceive of our various relationships with other individuals in private, business, and public life in terms of law and legal effect. Values and standards have public, social relevance in the measure which they are articulated and enforced by the courts. In many ways, the burdens of defining and validating socially important values which moderate conduct have been shifted to the courts. This is particularly evident in cases regarding judicial review of legislative and executive action on grounds of human rights and freedoms. The public articulation of political, social, and economic ideas speaks in the language of law and legal rules, in terms of rights and duties, obligations, liabilities and claims, and enforcement. Yes, we have the benefit of peaceful and orderly compulsion and obligation under authority and force of law, but it does come at the cost of requiring social values, mores, relations, and so on, to be reducible and reified into legal form.

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[43] See, e.g., Haljan 2009, pp. 278–279, and works cited there.

[44] Whether further the constitution itself derives from a norm one level higher, or represents an irreducible or self-generating and self-standing political fact, remains live for debate between the schools conventionally headlined by Kelsen on the one hand, and by Schmitt, Hart, and so on, on the other. But even behind Kelsen's ultimate norm there is the irreducible and self-standing political fact of a world comprised of states.

This is particularly the case with our relations to government and public administration. The creation of the regulatory state threatens, ironically, rights and freedoms by subordinating them to—or even submerging them under—the vast collection of duly enacted rules and regulations. Discretion, individuality, choice and freedom risk becoming minimalised and compressed under the weight of constricting and restrictive regulations in the regulatory state. To a degree, this is counterbalanced by pressures for greater transparency in government action, originating out of the current of democratic participation. This would serve to allow sufficient opportunity to question the necessity and scope of regulatory mechanisms, and modify or abolish them if necessary. The more sizeable weight, however, has been loaded upon the judiciary and judicial process. It is not necessary here to seek the now wide collection of examples at the apex of judicial control, constitutional review. The expanding body of civil law cases, of administrative law and of judicial review of government acts in domestic legal systems is example enough. Suffice it to say that the judiciary has come to bear a significant responsibility as the primary guardian of the rule of law.

2.1.2.2 The Rule of Law Mindset in International Law

Accompanying these changes in the internal structure of states was also an evolution in interstate relations. The efficiency and destructive powers of modern warcraft created both an aversion to the casual use of force to determine international relations, and the realisation consequently of its persuasive force, as a threat and in reality, to compel state action.[45] Korea, Vietnam, Iraq and Afghanistan are but a handful of many more examples. With not a little irony, that cogency did not simply rest on the power of violence to attain desired ends, but also the widespread destabilisation it produced, and the very real potential for a costly and drawn out stalemate between opposing forces. The aftermath of the world wars also contributed to the collapse of nineteenth century colonialism and the dismantling of the remnants of those empires. Economic exhaustion occasioned by war produced a political exhaustion, and a desire to concentrate on rebuilding national welfare and wealth. Ideological motives, with their footing in the national mindset of the rule of law and human rights, expressed themselves internationally in terms such as "self-determination", "the community of man", and so on. The development of transnational economic trade and cooperation generated not only the impulse to greater cooperation between foreign regulatory agencies, but the perception of a disaggregated and permeable state sovereignty.[46] The focal point for "modern" or "postmodern" international relations has been one peaceful coexistence, modulated

[45] Not to dismiss the impact of terrorism. In fact, the impulse to casual violence has shifted from states to non-state groups, working within and outside of established states, to destabilise them. See generally, Chadwick 1996.

[46] As in Moran 2007.

by reciprocity and economic cooperation. Violence and aggressive force are seen as an exception, a necessary evil or aberration.[47]

The transposition into international law of these developments in the internal and external conduct of state business has altered the perception of what comprise the objectives of international law. In reaction to depredations and suffering, and in the name of preserving wider peaceful relations among states and peoples, international law in the twentieth century is understood actively to supplement or even supplant national legal and political situations seen as vulnerable, deficient, or in collapse.[48] Less negatively, perhaps, international law is seen as an instrument to strengthen and support domestic commitments to democratic institutions and processes, and the effective practice of human rights there.[49] Oppression and suffering in a state is seen to lead inevitably to destability and disorder at an international level, whether by attracting intervention (invited or not) from other states, an exodus of refugees or the like. Addressing problems and issues through collective, international action can provide material and other assistance; strengthen existing national devices under threat, and avoid the degeneration of circumstance and institutions. Collective state action can respond to specific, local crisis situations, in order to render humanitarian assistance and relieve suffering. Collective action can also be proactive, in the form of international organisations and institutions, which assist states and guide policy, by offering a measure of uniformity and neutrality.[50] Thus on the ostensible basis of preserving world peace, order and human rights, international law in the twentieth century would claim a greater role in the internal affairs of a state, directly or by influence, and seek thereby to assure peace and stability.

With this desire to play a greater and more proactive role in governance, international law would draw heavily upon the rule of law mindset. The rule of (international) law holds that (1) the conduct of states can be constrained and restrained by legal rules (state as a subject of law bound by law), such that conduct outside the limits so established is subject to some sanction and penalty,[51] and (2) a defined, stable, objective process creates and enforces these binding rules of like character. The key is the compulsory, obligatory character of the law. Rather

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[47] Hence the qualification added by Koskeniemi 2005, p. 497ff: a peace based on principles of which we can approve. And echoed in Chadwick 1996.

[48] Koskeniemi 2005, p. 476ff.

[49] See, e.g., Franck 1990; Benvenisti 2008; Slaughter and Burke-White 2007; Moran 2007; Gardbaum 2009, and Kumm 2009.

[50] See e.g., Raustialia 2006, p. 428ff; Boyle and Chinkin 2007. And hence the proliferation of treaty-based international bodies, such as the UN (1945, following upon the ill-starred League of Nations); the ICJ (1947, succeeding the PCIJ); the WTO (1948, 1995); the IMF (1944); the World Bank collection of bodies (IBRD 1947; IDA 1960; IFC 1956, MIGA 1988, and ICSID, 1966); NATO (1948); OECD (1961); OSCE (1975, successor to the CSCE); the CoE (1949, notably supporting the EConvHR and the ECtHR), and of course the predecessors to EU, the ECSC (1950) and the EEC (1957).

[51] Not necessarily one of reprisal or aggression, but perhaps being ostracised, or being excluded from international dealings, and so on.

than by violence, states and other actors on the international plane are considered to desire achieving their objectives by the influence and compulsion of rules, that is, within a legal framework.[52] It articulates the mutual and reciprocal interaction among states in the form of legal relations. As remarked in *Oppenheim's International Law*, "[E]very international situation is capable of being determined as a matter of law,"[53] whether or not an applicable, explicit rule is quickly at hand. That framework arises through the variegated ways in which states agree and cooperate, whether in a formal setting such as multilateral conference or treaty negotiation, or in an informal setting through exchanges of diplomatic notes or other conduct. The rules would transcend the peculiarities of any given situation so as to be regarded as having a general application. States thus comply with the rules of international law, expecting other states to do so as well, as elementary to their interactions. Indeed, states are considered bound to observe international law in their capacity as states, as "members of the world community" whose existence is owed to and creates the framework of international law.[54] In complying with those rules, states acknowledge thereby certain limits on and moderation of their sovereign powers, along the same lines as those limitations and processes imposed by domestic constitutional precepts. Complying with law on the international level thus begins to commingle and be conflated with a state's obligations domestically. The rule of law domestically and the rule of law internationally are but two sides of the same coin. That is simply the normativity of law.

This reconstruction of international law into an activist and proactive regulatory system for states imposes substantially greater demands upon the latters' internal architecture. The implementation of treaties, international rights, rules and obligations, the pressures to extend the depth and reach of international law within state systems, and the rule of law mindset generally, all require transposition into the domestic constitutional order in some fashion, even if the effort is directed merely to reciting certain historical precedents. Yet international law's intervention in internal state affairs—albeit ostensibly with an eye to their external ramifications—retains largely the same concepts and mechanisms as its nineteenth century variant with the predominantly external perspective. The conceptual foundations and instruments of international law, customary international law and treaties, sovereignty and its attributes, remain the same, despite some attempts to widen the field of players to international bodies and NGO's, and to reinvigorate attention on such concepts as obligations *erga omnes* and of *ius cogens*.[55]

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[52] See e.g., Henkin 1979, p. 29.

[53] Jennings and Watt 1992, p. 13, and see O'Connell 1970, vol I, 1.

[54] Perkins 1997, p. 469ff.

[55] Most international law scholars would root the concept of "*ius cogens*" more deeply in international law, by virtue of latter's natural law heritage. Hence its appearance in the 1969 Vienna Convention on the Law of Treaties represented merely a codification of a rule of longer standing, rather than the crystallisation of a new rule: see e.g., Byers 1997; Paulus 2005, pp. 300–301 (and works cited there). See also Weil 1983 and Tams 2005, p. 99ff. See also Lepard 2010, p. 243.