3 International law as law

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Introduction

What is the character of international law as a legal system? How different is international law from municipal law? Is this difference significant or is it made into more than is justified? What consequences flow from international law being a distinct legal system in terms of its practice and prospects?

International law as a discipline has exhibited an unusual propensity to ask such questions, perhaps because, historically and politically, this has often seemed less a matter of course than for domestic legal orders. In truth the debate about international law as law covers three distinct though related questions. The first deals with what type of legal system international law is. It is immediately quite clear that international law operates differently from domestic law. But to what extent is it a *sui generis* legal system? Second is the rather more ominous question of whether, on the basis of its defining characteristics, international law can even qualify as ‘law’ properly so called. Confronted with widely publicised and spectacular violations of international law, popular opinion is often tempted to give up on the idea, yet international law is routinely treated as law by its practitioners. Why this disjunction? Third, one of the difficulties in determining what sort of law international law is, or whether it is law at all, is that it is a constantly evolving legal system that has seemingly taken many different shapes over time. Is international law so changeable that it lacks the minimum stability a legal order should have, or is it instead remarkably constant over time despite the appearance of constant renewal?

Characteristics: a classical view of international law as a legal order

International law is most often understood as a law that is fundamentally different from domestic law because it operates between equal and sovereign
collectivities. Yet perhaps what more aptly characterises international law is its quality of being a law ‘in between’: both irreducible and inter-state on the one hand, and profoundly influenced and even tempted by the domestic law model. As we will see, these tensions manifest themselves in terms of international law’s subjects, its ethical tenor, its organising social principle, its epistemological outlook, its normative structure, its relationship to domestic law, and its functional *modus operandi*.

**Subjective dimension: between states and non-states**

Perhaps the defining characteristic of international law traditionally is that it is a law of states rather than individuals. This was not always clearly so: the idea of the ‘droit des gens’ or ‘jus gentium’ suggested a law that applied to the relationship with foreigners rather than between equal, self-governing units. To modern ears, however, the very word ‘inter-national’ suggests a system geared towards the organisation of relations between self-governing collectivities. Statehood comes with a bundle of unique privileges including a monopoly of internationally legitimate violence (whatever that may be at any one time) and the ability to bring international claims. International law is in the first place that legal system which confers full legal personality only on states. Much of international law is devoted to protecting what one might call this ‘monopoly of subjecthood’, and the sovereignty that is its basis (see also Chapter 2). For example, the law of immunities ensures that states can for the most part not be sued before domestic courts and that certain agents of the state cannot be the object of any measure of execution (e.g. an arrest or a freezing of accounts).

What it means to be a state in this context is typically presented as an objective notion, indifferent to the particular political or ideological make up of states. A state is supposed to be no less a state in that it is federal or unitary, dictatorial or democratic, liberal or illiberal. At the same time, international law has always been associated with processes of excluding certain entities from statehood. Colonisation was, for example, justified by the fact that non-European political entities did not satisfy the demands of sovereignty and could not be expected to abide by the rules of international law. In a deeper sense, the world of states has perhaps always been defined by an ‘other’ that is incapable or unworthy of sovereignty.

Moreover, even as states are recognised as the principal subjects of international law, the international legal order has long witnessed the emergence
of non-state actors with at least limited international capacity. Beginning in the late nineteenth century, international organisations were created that have increasingly been seen as endowed with international legal personality. In addition, a number of non-state actors – public corporations like the East India Company, national liberation or rebel movements, multinational corporations – had a more or less recognised status in international law. The Nuremberg tribunal made it clear that individuals too can be ‘subjects’ of international criminal law, and the growth of international human rights protection systems has given individuals the right of petition before at least some international bodies.

However, these non-state actors have only derivative or partial status as subjects of international law. They do not challenge the primacy of states as the only subjects partaking of the full range of rights and privileges conferred by international law. For example, international organisations can only do that which they have been mandated to do by states. Yet this recurrent recognition of non-state actors deeply influences international law’s physiognomy.

**Ethical dimension: between pluralism and cosmopolitanism**

International law represents more than just the legal system of inter-state relations; it can also be said to classically express a certain ethos of pluralism. That ethos is deeply embedded in European history: the shattering of the aspiration to a single Christian realm following the Reformation and the traumatic wars of religion. The Treaty of Westphalia entrenched the principle *cujus reo, ejus religio* – essentially the idea that the global system would be a safer place, after three decades of devastating war, if each country were governed according to the monarch’s religion. The idea also embodied a grudging respect for difference. Against the claims of a universal Holy Roman Empire, the emerging system of states, complete with a rudimentary system of minority protection in the form of internal religious tolerance, was one that promised to resist the urge to impose a single vision of the common good globally.

In this view, international law is based on a belief in the incommensurability of beliefs, and the impossibility of operating under a single unifying formula of the ‘good life’. It is an intellectual extension of liberalism, and as a system is dedicated to protecting a diversity of beliefs. However, the system is certainly not beyond considering that certain ethical values
transcend borders and are, or should be, common to all societies. The prohibitions on torture and on certain other atrocities are typically mentioned as minimum foundations of a common ethical project. Indeed, even as international law promotes a pluralist concept of international society, it also serves to suppress ways of life seen to be incompatible with those common values. The ‘standard of civilisation’, for example, long served as the arbiter of whether certain societies were fit for international life.

Social dimension: between anarchy and hierarchy

The fact that the principal subjects are states leads to a view of international law as a law operating between equals and without a superior authority. It is often said that the international system is an ‘anarchical society’ (Bull 2002). Anarchy, which is quite different from chaos, refers to the fact that the system is without superiors. Indeed even the most forceful international organisations are poor candidates for ‘superiority’ given that they exercise their usually quite limited powers only at the behest and tolerance of states. As a result of this anarchical structure, classical doctrine asserts that no international law can be imposed upon states except of their own choosing. International law tends to start from a position of complete freedom of states that it then attempts to curtail, rather than from a position of obligation from which zones of liberty might emerge (S.S. Lotus, Advisory Opinion, PCIJ (1927) Ser. A No. 10, p. 4). Moreover unlike domestic projects, the international legal project is largely procedural rather than purposive; it is about coordination rather than subordination, a system aimed at protecting coexistence rather than some common substantive goal (Oakeshott 1991; Nardin 1988). International law gives states the tools to achieve certain outcomes, rather than telling them what outcomes they should reach.¹

Yet, for all its concern to express a principle of coexistence, the international system’s ‘anarchy’ has long been premised on the idea that there is such a thing as an ‘international society’. This is reflected in, for instance, the idea that there are norms of general customary international law applicable to all states. (For more on sources, see Chapter 8.) Being a sovereign typically involves a duty to respect the sovereignty of others, and this is in itself a recipe

¹ For example, rules regarding diplomatic representation or even the conduct of war do not tell us what diplomatic representations should be geared towards and whether wars should be fought, but only how these activities should be conducted.
for certain obligations of care and good faith. The idea of state responsibility has long reflected the idea that states may be made to account for their acts. In other words, even an anarchical society can be quite an ordered society. Aside from specific international organisations, there is also a considerable sense of attempts at global regulation – in Wolfgang Friedman’s words, a move from an international system of coexistence to one of cooperation (Friedmann 1964).

Moreover, the international legal system has always been less anarchic than it seems, underwriting vast empires that were strictly hierarchical, and behaving very much as a ‘centre projecting a periphery’ (Korhonen 1996).

Epistemological dimension: between positivism and naturalism

The birth of international law is intimately linked to thinking from within the tradition of natural law. For many of the so-called ‘Founding Fathers’ of international law, the law of nations was a corpus whose authority lay in divine law and whose content could be ascertained following the dictates of ‘right reason’.

This faith, that international law could be dictated by natural law, evaporated with modernity. At the heart of the modern international legal project is the notion that international law has successfully abstracted itself from ethical, particularly metaphysical and natural law, thinking, to the point where a law does not cease to be law even if all were to agree that it was immoral. This is justified on the basis that in a deeply divided society, what is needed is an international law that can be determined through recognised professional procedures, distinct from the political or moral values that it may, more or less accidentally, embody.

The ideology of international legal positivism is based on the idea that international law is ‘observable’ from the practice and custom of states, that it can be inferred rationally from their interactions. For example, a feature of traditional international legal work is the practice of documenting state practice (e.g. in nationally published ‘recueils’) as an indication of where the law stands. International lawyers are consummate treaty interpreters, and the Vienna Convention on the Law of Treaties (1969) as well as jurisprudence of the International Court of Justice (ICJ) suggest strict ways of construing the intent of drafters. Finally, much scholarly work in international law is ‘doctrinal’ in nature – seeking to expound fundamental legal principles coherently and according to analytical tools that are themselves taught as
part of ‘the law’. These various ‘tools of the trade’ help to distinguish the discipline as one grounded in technocratic rationality and a distinct savoir faire.

At the same time, international law finds it difficult to abstract itself entirely from any reference to higher-order norms of morality or justice (Koskenniemi 2005). ‘Positive’ norms that would entirely clash with deeply held beliefs are resisted. Occasionally, international law directly incorporates references to a quasi-metaphysical residue (e.g. the Martens clause in the laws of war). A certain humanism permeates its value system – international law as the ‘gentle civilizer of nations’ (Koskenniemi 2001), rather than merely the nations’ blunt instrument of self-interest.

**Normative dimension: between horizontality and verticality**

From a normative point of view, international obligations are norms that apply between equals. International law is ‘contractual’ rather than ‘legislative’, an assortment of bilateral and multilateral engagements, each in principle voluntary. Obligations are often presented as synallagmatic in nature, involving an exchange of reciprocal promises. This means that they apply primarily in the sphere of state-to-state relations and there is little pressure by international law to make its norms part of domestic law (for example, states can opt for quite ‘dualist’ arrangements, wherein international law only becomes part of domestic law if it is incorporated legislatively). Moreover, international law cannot be enforced against foreign states before domestic courts because of sovereign immunities.

Within international law there is little hierarchy between norms, since in theory states can agree to virtually anything. One characteristic of a horizontal system is that, in dealing with the consequences of breaches, it only knows of the equivalent of ‘contractual’ (i.e. treaty violation) or ‘extra-contractual’ (violation of a non-treaty obligation) responsibility. There is no delictual, still less criminal, responsibility because, all norms being ‘equal’, the consequences of their violation are also essentially the same. In terms of adjudication, this is manifested by the fact that litigation traditionally occurred only when one state sued another. Moreover, the system was reluctant, with a few exceptions, to allow a state to sue in the exercise of a sort of ‘actio popularis’, acting in the public interest (*South-West Africa* cases, *Second Phase*, ICJ Reports 1966, p. 6, 47).
Yet these dimensions are also quite contingent. International law can hardly be said to have always operated on a level (‘horizontal’) playing field, and ‘unequal treaties’, in various guises, have long been a characteristic of the international legal order. Although agnostic about modes of implementation, international law does consider that states’ domestic legal arrangements are no defence to a violation of their obligations under international law, thus creating some pressure to incorporate these obligations into domestic law when appropriate. Moreover, the international legal system is prone to its own internal push towards making its norms and enforcement more vertical. There has long been a debate on the possibility of the ‘criminal’ responsibility of the state. Even if that debate led nowhere, the idea that certain norms apply erga omnes means that third states which cannot show a direct interest may nonetheless be justified in complaining about their violation. Moreover, the case of individual criminal responsibility suggests that the system already considers that certain violations fundamentally endanger international existence and should be marked by particular stigma.

Functional dimension: between decentralisation and centralisation

Finally, and perhaps most significantly for practical purposes, international law can be said to traditionally lack some of the key hallmarks of a functioning domestic legal order: a centralised legislative body, a compulsory court system, and centralised enforcement. More than that, one could argue that these functions are not strictly separated in the international sphere, and that what counts as legislation or adjudication or enforcement is at times hard to distinguish.

The absence of central legislative structures is typically seen as less problematic than the absence of compulsory jurisdiction or centralised enforcement. It reflects the fact that international law’s mode of emergence was traditionally highly peculiar, and had more to do with the diffuse and bottom-up crystallisation of norms over time, than the adoption of a clear centralised legal framework, a feature that was seen as problematic by newly independent states who had not existed when the norm supposedly came into existence. It also explains the classically central role of custom as a source of international law, emerging from consistent practice and opinio juris (see Chapter 8). As a result, the work of international lawyers has often been qualitatively different from that of domestic lawyers in that much time
and energy are devoted to elucidating the authority of sources and the content of norms. These typically have to be gleaned from custom or general principles of law, whereas domestic lawyers can count on constitutions, codes, laws and a wealth of judicial decisions.

At the same time, international legal work is often seen to move towards greater centralisation and institutionalisation. Starting from the great diplomatic congresses of the nineteenth century to the emergence of modern global conferences, the rise of international organisations equipped with deliberative fora has given a distinctly quasi-legislative tinge to much international norm production.

For a long time, the international system lacked permanent international courts; thus states, if they were so inclined, had to turn to forms of *ad hoc* settlement of disputes. Voluntary mediation or arbitration was the most that international law offered. This began to change with the establishment of the Permanent Court of International Justice (PCIJ) in 1922 and the International Court of Justice in 1946. The ICJ’s lack of compulsory jurisdiction no doubt significantly limits its ability to act very differently from arbitrators. International courts also have limited powers of enforcement, even though their judgments are formally binding. Yet the permanent character of these international judicial institutions and the creative uses to which they are put, alongside a number of regional courts with more compulsory arrangements, means that the international legal system is no longer one that can be defined by a total absence of judicial settlement.

The international legal system has traditionally had little enforcement capability in the form, for example, of an international executive. This fundamental weakness of international law is all too well known, and has been exposed time and time again, particularly in relation to the unlawful use of force by powerful states (e.g. the invasion of Iraq in 2003). Short of a reliable sanction, there may be few concrete legal consequences that will flow in practice from violating certain norms of international law. The system does nonetheless rely routinely on a degree of decentralised

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2 These have included solicitation of significant advisory opinions by international organisations (on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996 or on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004), and attempted exploitation of undervalued compromisory clauses (e.g. the *LaGrand* and *Avena* cases on the basis of the Vienna Convention on Consular Relations, or the *Georgia v. Russia* case on the basis of the Convention on the Elimination of Racial Discrimination).
enforcement. The traditional focus in international law is on non-execution, counter-measures and even reprisals as remedies for breaches of international obligations. The most spectacular form of ‘self-help’ is self-defence, as anticipated in article 51 of the UN Charter. Moreover, elements of centralisation of sanctions are perceptible. Although tasked principally with maintaining international peace and security, the Security Council has increasingly incorporated elements taken from international law and justice to define its core mission, to the point that some see it as at least an occasional enforcer of international law.

**Ontology: is international law ‘law’?**

As the above discussion shows, the classical characteristics of international law are themselves problematic and contentious. There is a perception that the lack of centralised organs weakens international law. Indeed some are driven to make the radical claim that international law does not deserve to be called ‘law’.

The debate about international law’s ‘law-like’ nature was initially spurred in the nineteenth century in the English realm by John Austin’s statement that international law is ‘law improperly so-called’ (Austin 1832 [1995]). It provoked a long series of responses and counter-responses, evidence that, if anything, international lawyers were piqued by the suggestion. Indeed, international law is a law that seemingly cannot much rely on ‘habitual obedience’ nor do without the constant invocation of arguments as to why it should be respected.

Nonetheless, there had also long existed the opposite perception, that the critique of international law is excessive and misguided, and that the debate about its ‘law-like’ nature had been futile. According to this view, these doubts largely arise from a definition of law solely informed by domestic concerns, and such a definition is both reductionist and claims too much (Williams 1945). Even constitutional law in most countries is self-enforcing, but this does not give rise to questions about its ‘legal’ character. Moreover, it is important to note the ideological motives behind debates on ‘international law as law’: when some argue that international law is or is not law, they might be making a point about the (il)legitimacy of the international legal order, or about the primacy of the local over the global.
At a certain level, whether international law is law is also a matter of ‘belief’, or ‘sentiment’ and thus the debate about whether it is ‘really law’ can be retold as a debate about whether it has ‘really been thought of as being “really law”’. Of course, the sentiment that international law exists – or does not – is likely to wax and wane depending, for example, on international events that seem to confirm or deny its existence (wars signal the breakdown and weakness of law; major institutional advances herald its renovation); or the level of ideological divisions (Soviet jurists during the Cold War would gladly have done away with bourgeois international law or rewritten it entirely; the end of the Cold War seemed to briefly herald a new international order); or whether any combination of actors sees it as a worthwhile project and invest significant resources in it (the Versailles Conference, the few years that followed the Second World War, decolonisation and the end of the Cold War come to mind as eras that have been defined by international legal imagination).

But the belief about whether international law is ‘law’ does hinge partly on the theoretical and doctrinal debates and it is to these that we now turn. What differentiates thinkers on this crucial question is that for some international law’s weak decentralised features make it less of a legal system; for others, international law’s decentralised features are irrelevant to its legal character; and for yet others, these features are a reason to change international law, to turn it into something more resembling domestic law. Finally, there are those who believe that we should simply strive to better understand international law as a different type of law, and those who find the whole debate to be a misguided effort that prevents us from asking the real questions about the ends of international law. For the purposes of discussion, these stylised positions can be roughly represented as five currents: the ‘deniers’, the ‘idealists’, the ‘apologists’, the ‘reformists’ and the ‘critics’.

The ‘deniers’

The deniers, going back to Hobbes, challenge the proposition that international law is law and are sceptical that a law between equals can be anything other than ‘morality’. Generally, this analysis is based on a perception of what international law lacks, namely some form of centralised and systematic enforcement. For John Austin, for example, international law was not law because it lacked ‘command backed by force’, which Austin
identified as the defining characteristic of law (Austin 1875, 86). After the Second World War, political ‘realists’ often emphasised that only national interests could account for how states behaved, and that international law was a system ill suited to the social reality it was supposed to preside over (Carr 1946). According to them, international law functioned only when no significant national interest was involved, and otherwise provided a normative gloss on decisions taken for other reasons. In our era, this critique has been renewed by scholars in law and economics who tend to see state behaviour as informed by rational ‘economic’ calculations (Goldsmith and Posner 2005). International law is thus either the name given to what states actually do for other reasons that have little to do with the pull of norms or, again, is a largely irrelevant body of symbols.

Deniers particularly criticise international lawyers for thinking that international law is the cause of that of which it is only the consequence. For example, if states do not go to war it is not because an international norm prohibits them from doing so, but because they deem it not to be in their national interest. The ‘norm’ that emerges as a result of the factual exceptionality of war is merely the appearance of a norm – it has significance only as long as states deem it in their interest to respect it. Even if states superficially engage in patterns of normalised legal interaction, what matters is that they do so for their own reasons, they will not commit to doing so in matters of life and death, and resort to a flagrant violation of ‘international law’ always remains an option. The lack of compulsory international jurisdiction is also a favourite target of the deniers. They point out that the fact that states can join at will, and withdraw more or less at will, from arrangements requiring them to submit their disputes to adjudication makes international law at best into a tool (to be used based on its usefulness) rather than a framework (binding and determinative).

For these reasons, deniers are often radical deniers in that they do not see that international law could ever become fully law and, as political realists, posit the primacy of force and the national interest (even endowing it with a measure of moral respectability) in international relations. They reject the idea that an anarchical society is a society at all in that it cannot impose or enforce obligations on its members. They emphasise the priority of the sovereign over any notion of international society. At best, international law is only the sum of self-imposed limitations by states, a mere ‘system of promises’ that can come unwound at states’ discretion.
The ‘idealists’

At the other end of the spectrum, the ‘idealists’ (understood as those who believe in the power of ideas rather than ideals) consider that international law is law because it is somehow mandated by some higher source. According to them, not everything is derived from sovereign consent. International law, even as a law for sovereigns, has its own sources of authority. Where the deniers see international law as ‘only’ morality, some idealists refuse to draw a neat distinction between morality and law, and argue that international law is law because it is moral or because it is moral for it to be so. Early modern theologians and lawyers such as Vitoria, Grotius and Pufendorf considered that what they called the law of nations (jus gentium) was mandated by natural law (both of divine origin and as ascertainable through ‘right reason’).

Although such ideas gradually became less popular, they continued to exert a significant residual pull; the idea that international law can be rooted in something higher than itself remained an object of deep fascination. Immanuel Kant, for example, established a strong connection between his a priori, transcendental method (practical reason) and the idea of international law. Hans Kelsen, perhaps the lawyer most associated with this current of thought in the twentieth century, considered the existence of the international legal order to depend on an a priori Grundnorm (basic norm) – although he was ambiguous about its precise content (Kelsen 1967). For thinkers in this tradition, international law can be derived from an ‘ought’ rather than an ‘is’ and is therefore impervious to the facile critique that it is not systematically respected. International law is, in a sense, because it must be. The role of international lawyers is thus to be true to the idea of international law’s legality, the idealists hypothesise it.

One classic idealist argument is to deny, against all appearances, the centrality of sovereignty, in that there must be some norm antecedent to it that tells us what sovereignty is, and what its proper usages are, since the sovereignty of any within the system must involve others treating it as such. Sovereignty cannot logically be its own legal source, or reveal itself as nothing else than circular force. This idea that there is something prior – and, unmistakably, higher – than the state is the defining mark of idealism, and is particularly apparent in contemporary discourse that emphasises the importance of human rights, for example, as a basic precondition of legitimate
statehood. A similar structure of argument is sometimes used in relation to the law of treaties. For example, it is not, despite appearances, consent that is the basis of the obligatory nature of treaties but the maxim *pacta sunt servanda* (treaties are binding), a principle that is itself prior to any explicit consent of states and provides states with a conceptual roadmap to understand what the consequences of consenting are. The maxim itself may flow from the very need of having treaties or some higher moral inclination that says that promises should be honoured, but it cannot itself be the result of an ‘original’ treaty.

Idealists also make much of the connection between the idea of international law and the notion of justice. They may for example argue that international law exists because it embodies a particular concept of justice. That concept need not be substantive and may rather, in the tradition of Lon Fuller, represent some inherent property of the law’s fairness or legitimacy (Brunnée and Toope 2010).

The ‘apologists’

The apologists, as a loosely defined school of thought, reject both the deniers and the idealists. They start from the reality of the social practice that describes itself as international law, and infer from some of its characteristics a *sui generis* legal character. Although they are not necessarily hostile to the improvement of international law’s mechanisms, they usually see international law as ‘not all that bad’, and stress the need to see what works rather than constantly seeking to reinvent the system. Some apologists even see some of the claimed deficiencies of a decentralised system to be ‘necessary evils’. Rather than applying a theoretical definition of law taken from the domestic experience, they tend to scrutinise international law to identify its ‘*génie propre*’.

There are many scholars who fall in this rich, intermediary vein which is often informed by the experience of international legal practice; they are less interested in language games and note that most international lawyers do not pause to ask whether international law is really law but simply apply it as such. The starting point is typically one that stresses, for all the absence of sanctions, the extent to which international law is – in fact and contrary to realist claims – more often respected than not. Apologists insist that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’ (Henkin 1979).
They allow for the possibility that there exist various shades of legality and illegality, rather than adopting a strict ‘conformity/violation’ polarity. If nothing else, in a sort of homage paid by vice to virtue, states rarely boast that they have violated international law – instead, typically arguing that they did not, or that the law does not say what their adversaries say it does. This, surely, is evidence that law matters. The legal affairs departments of Foreign Ministries typically spend a lot of time advising governments of their obligations in advance, and this advice tends to be taken seriously. The overall image is one in which violations are not ‘quite as bad as they are made out to be’, and international law is more often honoured by respect than in the breach.

Why this is so is a puzzle to which apologists have no dearth of answers. Sociologically inclined international lawyers from Westlake to Abi-Saab stress the deeply social nature of international law (ubi societas, ibi jus) and the primacy of the social over individual units (Abi-Saab 1996). International law must exist since (although this seems to beg the question) international society exists. That society is shaped by values and processes that are tailored to its aims, however limited, and evidenced by a considerable degree of non-hostile interaction. Constructivists emphasise how international law is not imposed from the outside upon preconstituted sovereign subjects, but powerfully shapes this subjecthood (Wendt 1999). This idea of international society as the basis for international law is given more credence by the development of many international institutions in the modern period.

Many have pointed out that, in such a social system, there are other reasons to respect law – including municipal law – than fear of force. Some reach for psychological analysis to reveal a general ‘propensity to comply’, or adduce a greater propensity to comply in certain regimes (e.g. liberal democratic ones) (Slaughter 1995); or focus on the role of ‘norm entrepreneurs’ domestically in encouraging compliance (Koh 1998). International law is complied with on a regular basis through soft means. Diplomacy, reporting, informal dispute settlement of various sorts, and increasingly mechanisms such as conditionality all have a role in maintaining at least a semblance of regularity and law-abidingness in international society.

3 In this, defenders of international law’s foundation in the social nature of international interaction have a proximity with scholars of international relations (e.g. the so-called ‘English school’) who, because they recognise the existence of an international society, are inclined to take international norms seriously (e.g. Bull 2002).
Indeed some apologists may seek to blur the distinction between interest and obligation, finding that the credibility of international law as law lies in the fact that it corresponds to a deeper structure of state interest. For example, reciprocity is both a property of international legal rules and an inbuilt reason to respect them. Moreover, even if enforcement is at times insufficient (which apologists concede may sometimes be the case), the argument is that enforcement is not as central to the definition of law as it made out to be. In seeking to show how a legal order is compatible with substantial decentralised enforcement, they invoke the precedents of primitive societies, in which law is enforced through retaliation by victims against offenders. They point out that the high incidence of crime in domestic legal systems does not generally lead people to question its legal character. Instead, they propose more refined formulas of what constitutes law and, consequently, international law. For example, Franck has drawn attention to the ‘power of legitimacy’ of certain norms and institutions as a crucial factor in encouraging compliance (Franck 1990).

In redefining international law as something other than constraint, while avoiding the critique that it is nothing other than morality and arguing for its usefulness, apologists emphasise the extent to which international law provides guidance and tools to deal with problems – the extent to which it is, for example, a useful ‘process’ (Higgins 1995). In this view, international law provides an indispensable tool of communication that enables social life by limiting misunderstandings, stabilising expectations, and increasing transparency; it leads to mutually satisfying outcomes that are compatible with at least a long-term view of the national interest and may even satisfy a certain sovereign aspiration to international morality or justice.

As a result, apologists are prone to view with more indulgence what others have sometimes seen as congenital deficiencies of international law. For example, they may find virtue in modes of law-production such as custom, which may be slow and indeterminate but are also evolutive, flexible and adapted to the needs of international society. Even decentralised enforcement is reconcilable with international law’s character as law. For example, the recognition of self-defence in the UN Charter can be seen as a way of outsourcing enforcement in exceptional circumstances by a system that can never rule out that it will be dysfunctional and thus allows states to

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4 In this they see the genius of international law – its ability to closely chart an underlying social structure – where deniers see its fundamental irrelevance.
‘take things in their own hands’. An interesting ‘apologetic’ argument, in this respect, is George Scelle’s idea of ‘dédoublent fonctionnel’ (Scelle 1956). Although Scelle deplored the bluntness of ‘self-help’ as an instrument of international law enforcement, he also suggested that in pursuing their national interest, states might at least at times be doing international law’s work for it. Some go so far as to consider that ‘war’ is part of international law enforcement (or at least just wars are). In other words, a state that defends itself against an act of aggression is obviously doing so largely for itself, but it also, in the process, vindicates the international norm against unlawful attacks.

The ‘reformists’

A distinct and often vigorous current, that has always existed, expresses an aspiration to ‘reform’ international law. The ‘reformists’ do not deny that international law as it exists is better than no law, but they are frustrated with its primitiveness and with the apologists’ rationalisation of its particular legality. A long line of reformist commentators have tended to see ‘apologists’, in particular, as ‘sorry comforters’ (Kant 1970, 103). Taking direct aim at their rationalisations, van Vollenhoven, for example, once deplored the ‘servile science of jurisprudence, *ancilla potestatis*’ which ‘instead of directing attention all the time to the shortcomings of a “law” possessing no sanctions or guarantees . . . contracted the habit of pleading that a law of peace which is continually ignored was none the less a “law” of spotless character and beyond reproach’ (van Vollenhoven 1932 [1936]).

Reformists are wary of a state-centred international law that they see as ultimately incapable of transcending egotistical national interests. In other words, they consider that ‘international law would be more law if only it were different’ and typically militate for international law to shed its anomalous specificity and become more like domestic law. As Hersch Lauterpacht, a reformist and one of the twentieth century’s most influential international lawyers, once put it, ‘the more international law approaches the standards of municipal law the more it approximates to those standards of morals and order which are the ultimate foundation of all law’ (Lauterpacht 1932, 318). The reformists’ is an evolutionary conception of international law, essentially biding its time until the conditions of international interdependence are such as to make the *civitas maxima* a reality. The ‘domestic analogy’ may not be a good way to analyse the current
international system, but it is put forward as a good programme for international law.

Reformists typically argue for a ‘purposive’ concept of international law. Asserting the commonality of basic values, they discredit the idea that international law is necessarily a law of coexistence or at best of cooperation deprived of telos. They focus on the promotion of such values as human rights, free trade, and a clean environment. Theirs is a faith in the possibility of determining common ends for the global community and in the power of international law to articulate these (Lasswell and McDougal 1992). Arguably, they support the elimination of some of international law’s foundational features, including the very idea of international law as a law between states – i.e., what may be called the ‘normalisation’ of international law. Collective security, for example, is an essential building block in a world in which decisions regarding the use of force are outside the purview of sovereign discretion. The reformists thus subscribe to more or less federalist ideas about ‘world government’, and see international law as imperfect but with the dynamic potential to evolve into a system like domestic law.

The ‘critics’

A fifth view in the debate on ‘international law as law’ takes issue with the very premise of this debate. It sees it as either a distraction or a thin veil to cover the reality of international law as a system of exclusion and oppression. ‘Critics’ are not simply impatient with the debate, as apologists may be. Rather, they see the debate as part of an omnipresent and professionally narcissistic structure of legitimisation, of portraying international law as something else than it is, and of defending the status quo. In fact, they see the problem as badly posed: the question is not whether a ‘horizontal’ international law is really law, but whether international law is really ‘horizontal’ in the first place. Where classical international lawyers see it as pluralistic, horizontal and decentralised, critical theorists, especially those coming from the Third World, have long argued that whatever conditions prevail between European powers certainly do not apply in their relations to non-European entities.

To them, the question whether ‘international law is law’, begs the question who is asking and of whom? The debate as currently structured has largely occurred, for example, between European or Western theorists and...
seeks to understand the particular jurisprudential anomalies that result from a law between equals. However, for most of its history international law has not been a law between equals. It has, rather, been a law that defines who is equal and therefore enjoys subjecthood – i.e. rights and obligations – in law, and who is unequal and therefore a mere ‘object’ of the law (Anghie 1996). The debate on ‘international law as law’ fails to acknowledge that many of the founding concepts of international law are derived from this process of exclusion (Anghie 2005). Critics particularly take issue with the idealists’ notion of international law as law irrespective of the real conditions of its operation. They also express disquiet with the apologists theme of international law as a law that operates within an unproblematised ‘society of nations’, when that ‘society’ is precisely the source of exclusion.

The critics share some affinity with the deniers, but they are less committed to a strong view that ‘international law is not law properly so-called’. Rather, they see that metaphysical debate to be secondary. They caution against making a fetish of the question of ‘what is law’ irrespective of the social relations within which it is embedded. International law may well be some sort of law and, indeed, it is because of its ability to define certain areas of law that it can circumscribe spaces for non-law. The critics may also share something with the reformists in thinking that international law should be other than it is, except that theirs is an insistence on making good international law’s original promise of protecting the pluralism of international life.

**Dynamics: international law as a system on the move**

The debates on ‘international law as law’ focus on international law’s perceived characteristics, but it would be a mistake to treat these as constant. International law is constantly evolving as part of an essentially dynamic and unstable international system, so that even the question of international law’s character must be answered against changing reference-points. For example, the debate was a different one during the Cold War or in the context of decolonisation, and has of late been considerably influenced by globalisation and what that portends for our understanding of law (Mégret 2008). It is also a debate that is shaped by its actors, of which there are an increasing number with divergent views about what international law should be.
In this respect, the popular linear view of international law as progressing from coexistence to cooperation to possibly integration may be dangerously simplifying. International law also ‘regresses’ periodically. Moreover, there is no reason to think that international law as it has been must of necessity remain that way. Rather than being stagnant or straightforwardly headed towards progress, international law is perhaps better conceived as a legal system which permanently oscillates between four tendencies: its own surpassing, absorption, dissolution and renewal. International law’s peculiar nature as a legal system emerges from the problem of maintaining a via media between those tendencies.

**Surpassing: centralising hopes and resolving contradictions**

Perhaps one of the most enduring images of international law is that which represents it as leading, through fits and starts no doubt, to the centralisation of the system, i.e. to world government or something quite like it. International law, in other words, is destined to become much more like domestic law. This is the reformists’ dream become reality and it suggests an exit route for international law ‘from above’. This vision is currently popular; the advent of a more centralised global legal system is a recurrent theme in international legal discourse.

While even in the past international law was tempted by centralisation, it effectively avoided becoming so centralised as to no longer be international at all. Increasingly however, the line between cooperation, integration and some form of federalisation is becoming unclear. This is evident in the emergence of strong regional organisations, particularly the European Union (as seen through the debate on whether EU law is still ‘international law’, de Witte 1994). It is also quite clear from the rise of international judicial institutions such as international human rights and criminal tribunals that seem to significantly by-pass state sovereignty. The increasingly legislative role of international organisations and conferences not only in policy-making but also in administrative rule-making is also part of a trend that suggests substantial transfers of sovereignty to the supranational. States have also begun to trust international adjudicatory mechanisms to the point where decentralised means of enforcement (e.g. non-execution, counter-measures) are frowned upon (see further Kingsbury, Chapter 9).

This willingness to enforce its norms more forcefully is in turn revealing of an increased tendency to see respect for certain norms as crucial to...
international order. Ideas of *jus cogens* and *erga omnes* norms have gone from being doctrinal curiosities to being taken seriously, as evidenced in the rise of an ‘international public order’ and ideas of international criminal responsibility. Characteristically, a whole school of thought has emerged that seeks to think in ‘constitutional’ terms about the international legal order, and in so doing takes international law a step further towards becoming like domestic law: international law is both ‘constituted’ by certain international values and ‘constituting’ of an international order (Klabbers, Peters and Ulfstein, 2009). At a certain level, ‘values’ almost become more important than formal positive arrangements, so that, for example, states should occasionally be willing to step in to protect threatened populations even when the Security Council does not authorise them to do so (e.g. NATO’s intervention in Kosovo) (Cassese 1999).

This tendency towards hierarchy is also revealing of a trend for international law to become more ‘substantively committed’. International law’s subject matter has grown considerably (trade, the environment) and incursions in matters that were traditionally the exclusive province of states have become increasingly marked (human rights). This produces significant overlaps between international and domestic law and puts at the forefront of international legal thinking issues of ‘vertical’ integration that used hardly to arise. Implementation becomes all important, as does the possibility of individuals invoking international law directly before domestic and, ultimately, international courts. International law increasingly becomes a ‘law of laws’ that prescribes the content of domestic legal regimes and oversees their operation rather than simply safeguarding the conditions of their independent existence.

Although the system may still acknowledge pluralism as one of its defining values, states are increasingly asked to subscribe to a minimum core of values, most notably those centring on international human rights. The latter are often presented as representing only a thin consensus, but typically pre-judge a number of issues that would have traditionally been left to the sovereign. Human rights is increasingly committing states to a certain view of the ‘good society’, as evident in the increasingly explicit disparagement of societies that fail to attain that ideal domestically. Sovereignty remains but is so riddled with caveats and under such constant scrutiny that it can no longer be described as the ordering principle of the international legal order.

Little by little, given the breadth, depth and seriousness of commitments that states are supposed to undertake as part of the package of being a
member of the international community, the impression emerges that the idea of an international law of coexistence does not do justice to the increasingly purposive nature of international association. Through increased interdependence and solidarity, yesterday’s society of ‘indifferents’ is giving way to a ‘community’ (Simma and Paulus 1998) of, if not friends, at least broadly likeminded and neighbourly ‘citizen-states’. In some regional contexts, coexistence has perhaps most clearly been transcended for the benefit first of cooperation, then of an integration that significantly blurs the distinction between the international and the domestic. International law becomes a global law of mankind, a cosmopolitan law displacing the sovereign as the ultimate community of reference.

Absorption: imperialism and the decline of international law

Contrary to the relatively rosy scenario of an international law pulling itself by its own bootstraps out of irreducible plurality, a darker scenario lurking in the background is that of international law falling prey to its old nemesis: imperialism (Cohen 2004). At regular intervals (Westphalia, Versailles, decolonisation), international law’s genesis and rejuvenation have been profoundly linked to the breakdown, both conceptual and practical, of empires. Conversely, the rise of empires has often put international law in a delicate situation in which it risks being instrumentalised, sometimes for its own subversion. Herein lies the paradox: although international law may well express an ethos that is fundamentally at odds with that of imperialism, it has also proved very capable of justifying imperialism. And whilst horizontal anarchy may well be an apt description of the relations prevailing between some states, it has often in practice been complemented by vertical hierarchy vis-à-vis others (Keene 2002).

To parallel a question that Richard Rorty once put at the heart of his thinking about human rights (not ‘what are human rights’ but ‘who is human?’) (Rorty 1993), what matters is not ‘what are the rights and duties of states?’ but ‘who is a state?’ In that respect, a long tradition, from nineteenth-century colonialism’s claims that non-European lands are ‘terra nullius’ to the vision of ‘collapsed states’ incapable of discharging their functions or of ‘criminal states’ whose populations are in need of saving has sought to deny statehood or full statehood to a certain states (Simpson 2004). The world according to imperialism is separated between ‘civilised’ and ‘uncivilised’, ‘democratic’ and ‘non-democratic’, ‘law abiding’ and ‘rogue’. There are deep
continuities between the formal colonialism of yesterday, and post-colonial enterprises of informal economic domination or cultural subjugation. At the very least, the traditional principle of the equality of states is severely put in question.

Rather than simply a rejection of sovereignty, this logic is often based on an assertion of the über-sovereignty (‘imperial sovereignty’) of some and the denial of the sovereignty of others. Legitimate war, for example, becomes a monopoly of imperial powers, whilst rogue states’ exercise of self-defence is presented as a violation of the international order. Obligations are owed to the empire that it does not owe to its subjects. The support of the international legal project by the hegemon, then, is obtained at great cost to international law including the ultimate price, the fact that the hegemon itself is not susceptible to that law. International law becomes a law of domination, subjugation and homogenisation, whose discourse of universalism thinly masks its logic of unipolar power, its role limited to giving the subjects of domination ‘clear indications of what is expected of them’ (Vagts 2001).

**Dissolution: the new transnationalism and the waning of the state**

An alternate tendency for international law is not one in which it is absorbed from above by the logic of empires or resolves its contradictions through centralisation, but one in which it is taken over by developments that ‘bite’ at its very foundation ‘from below’ (Mathews 1997). The challenge here is not only to the internationalism of international law but also its very publicness, and to the monopoly of states on the formulation and development of international law. To use an image, rather than transcending its ceiling, international law sees its conceptual floor collapse. Rather than an excess of centralisation, international law is rendered brittle by an excess of decentralisation. Rather than specific, territorially determined empires, the international legal real becomes suffused with the logic of ‘Empire’, an a-territorial and a-temporal structure of global domination profoundly implicated in the production of legitimate violence (Marks 2003).

This idea of an international law transcending the state altogether has had precedents such as the *lex mercatoria*, the famous medieval transnational law of merchants. It is anchored in a periodic distrust of the state that is perceived as corrupt, sub-optimal, inefficient or unjust. The new
transnational law occasionally seeks to circumvent the state entirely by reaching its regulatory arm all the way to non-state actors (corporations, armed movements, individuals, non-governmental organisations (NGOs)). At best the state serves as a sort of conveyor belt for instructions coming from above; at worst it is seen as an irrational impediment to a work of global regulatory homogenisation facilitating, most notably, the operation of the world economy. Infra-state actors may even conspire in hand with supranational ones to unhinge the last remnants of sovereign resistance.

International law thus increasingly operates in the interstitial space between the public and the private, becomes hybridised and eventually even fully privatised. Law is produced by the actors themselves (self-regulation) rather than the sovereigns (e.g. the Global Compact),\(^5\) traditional intergovernmental relations are replaced by occasionally shadowy horizontal regulatory networks that link governmental officials in communities of expertise (e.g. the Basle Committee); ‘governance’ (the G7 or G20, the IMF Board of Governors) replaces diplomacy (Slaughter 1997); networks take over formal international organisations; vertical relationships (for example, international organisations to civil society, international courts to individual petitioners) substitute for horizontal state-to-state relations; accountability replaces (international) responsibility; adjudication is replaced by arbitration; constitutionalism stands in for democracy; lawyers give way to technocrats.

Under this scenario, international law becomes virtually indistinguishable from domestic law except through its broad, ubiquitous character. Fragmentation is the order of the day, one in which functional logic dominates public integration. A bizarre new legal geography emerges, one made up of islands of law in a sea of regulation. Territory becomes secondary as an ordering principle as the logic of law increasingly follows persons (e.g. the law of foreigners) or the exercise of power (e.g. occupation) or operates entirely in de-territorialised realms (e.g. the internet). Demands against the system manifest themselves in the form, at best, of ‘global administrative law’ (Krisch and Kingsbury 2006).

With the fall of the sovereign, it is also the positive and centralised character of international law that is challenged: whereas public international law adopted a formalist stance focused on sources, global regulation draws its inspiration from law and economics, rational choice and institutional

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\(^5\) The Global Compact is a UN initiative to encourage corporations worldwide to accept certain sustainable and socially responsible commitments.
design theories. Establishing the pedigree of norms whilst refraining from evaluating their substantive content is seen as passé since ‘we’ know what the ‘optimal’ norms are. Characteristics that were once thought to be flaws of the system (e.g. its ad hoc character) are glorified. The venerable international society of states is replaced by a global system of states, individuals, corporations and networks, in which no actor stands necessarily above any other. The legal system that emerges is one that is perhaps best suited to what has sometimes been described as the ‘new medievalism’ (Friedrichs 2001).

Renewal: appeal and limits of the via media

Finally, there remains the possibility of a more fundamental renewal of the international legal project. ‘Restoration’ of a mythical classical international legal system made up of jealous and absolute sovereigns is perhaps the least likely scenario, given the contrary pushes of both centralisation and fragmentation. However, there would seem to be room for both an extension and a deepening of the international legal project that is perhaps best conceived as international law living up to its promise.

In many ways, especially in its classical form, the project was never fully realised, and excluded many who sought to partake in it. Rather than seeing decolonisation as a ‘moment’ in the history of international law, one might see it as a never-ending process of resistance to rampant domination of some states by others, opening up the way for a more equitable sharing in international affairs. Perhaps paradoxically, it has often been those forces that were excluded from sovereignty yesterday that have become some of the international legal system’s most ardent defenders. In that respect, international law can count on the support of the many who consider that the value pluralism implicit in sovereignty is one of the better protections against the temptation of Empire. The decolonisation of international law is fundamentally an epistemological rather than a simply territorial project, one that would seek to emancipate fully the international legal order from its indebtedness to patriarchy or racism.

Against the formalism and intellectual grandiloquence of ambitions to transcend international law from above, international law could emerge as a renewed locus for classical cooperation, prompted by ever-increasing challenges to global life, particularly the increasingly erratic functioning of the world economy or the threat to the environment illustrated by global warming. This ‘Grotian’ route to international law is one that is frequently
announced by international lawyers under different guises (Lauterpacht 1946). Although it has perhaps never been as challenged as it is today, it may become attractive precisely because of the way it can cancel out some of the more dramatic consequences of alternative routes: neither world state, nor Empire(s), nor private free-for-all.

However, the system will also be increasingly urged to defend its authority against challenges for greater participation, more equitable distribution, and more systematic enforcement. In particular, it will need to be better understood (and better understand itself) as one that, despite its claimed neutrality, has had and continues to have significant distributive impacts. A better understanding of how international law also manufactures exclusion and domination might emerge as an antidote to some of the hubris associated with the discipline. At the same time, international law as a broadly inclusive social project may need to become more imbued with debates about the conditions of an internationally just society (Buchanan 2007; Rawls 2001 and see Pogge, Chapter 17). The difficulty will be for the system of international law to adapt to some of these challenges without disowning itself, or falling prey to the accusation that it is merely a cover for something else.

Conclusion

International law’s peculiar approach to law can perhaps best be described as that of a law that is ‘in between’, characterised simultaneously by what it seeks to escape from (e.g. wars of religion), what it is not (e.g. domestic law), and what it aspires to achieve (perpetuation, surpassing, transformation, etc.). This quality is a precarious one that relies on a particular conjunction of historical forces, preferred subjects, a certain ethos, a concept of society, legal constructs and a functional architecture.

The debate on international law’s ‘legality’ reveals many connections between competing views. In terms of understanding the international-law-as-law debate, idealist contemplativeness, apologetic rationalisation, reformist ambition all share a certain basic faith in the reality of international law; apologists and idealists may find common ground in the idea of ‘international society’ as the basis of international law – the former seeing it as a basic fact, the latter tempted to idealise society based on a concept of the innate sociability of humans. Apologists can, in their rush to rationalise
what is, end up conceding too much and thus come close to the deniers of international law’s legal character; apologists and reformists alike tend to share a displeasure with the existing state of international law and a desire to make it more like domestic law; critics, in their displeasure with the emphasis on ontological questions dissociated from the practices of power, can be both deniers and reformists.

The debate, finally, must be understood as a dynamic and constantly evolving one. Many connections exist between different visions of what international law might turn out to be: for instance, the hailing of a global constitutional order in-the-making can serve the powerful by allowing them to dress their exercise of power in universalistic garb (references to ‘humanity’ in particular may serve interventionist agendas). There is a certain paradoxical affinity between the effort of completing the international project from above and the undermining of the state from below: humanitarian intervention and the lex mercatoria, for example, share a diagnosis about the obsoleteness of the state; both the centralising project and that of transnational law may at times be tempted into dangerous alliances with the hegemon to provide credible enforcement. Perhaps more often than not, the system will infelicitously combine aspects of all these: the zealous ordering drive of the centralising aspiration; the willingness of its more powerful subjects to mistake their national interest – or at least Weltanschauung – for that of the system; the general sense of chaos and dislocation that comes from the fragmentation of the state.

By the same token, however, these alternative views of global order may also keep each other in check, so that none is ever fully realised. The reformists know that international law’s areas of integration are really only pools of regional or sectoral cooperation, where states have a particular interest in creating strong regimes, and that sovereignty is much more resilient than regular announcements of its demise suggest; there is a deep moralising thrust at work in the international system and an ingrained resistance to hegemony that always seems to counterpoise attempts to hijack international law for purely domineering aims; the movement to de-publicise and de-territorialise international law is regularly upset by reassertions of the public sphere and the considerable residual military, economic and symbolic resources of states.

Restoration of a ‘classical’ international law based solely on a society of states may be unlikely, but so are various scenarios announcing the demise of international law. The tension between models of stasis, change, autopoiesis,
reform, progress, and eternal returns is almost palpable. At the intersection of these forces, international law so far remains as the appealing default position of the international system. International law is a legal regime which, despite the best attempts to reform, instrumentalise or dissolve it, best expresses a mixture of diversity and community, power and idealism characteristic of the global system.

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