

## International Law

Written by Knut Traisbach

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KNUT TRAISBACH, JAN 1 2017

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International law is an important area to understand and much of it is theoretical or historical in nature – building on themes explored in the previous chapters. You have seen in the preceding chapter that some of the discussed theories regard ‘norms’ as a regulatory force in international relations, although the theories differ in their understanding of the relevance and function of these norms. This chapter takes up this notion and introduces you to the role of international legal norms as a particular means for the social regulation of international affairs.

Imagine a small settlement with a number of properties on each of which stands one house in which lives one family. This settlement has no common government, parliament, court system or police force. The internal affairs of each family as much as the borders of each property are respected as inviolable. The families have predominantly bilateral relations with each other and engage in commercial exchanges of goods and services. It is commonly accepted that if the head of a family dies, the established promises to other families and agreed exchanges are respected by the heirs. When children decide to delineate a new property or when a new family from elsewhere wants to settle in, the other families must agree first and recognise this new property. When disputes between families arise, they may result in violence, especially if someone challenges an established border or intervenes with a family’s interests. It is commonly accepted that one may have recourse to force to defend one’s interest in family and property. Other families do not intervene in these disputes as long as their interests are not affected or they have formed a special alliance with another family.

Ask yourself now whether you would call this settlement a ‘legal system’? Would you even speak of ‘laws’? Perhaps intuitively you would say no. Yet, consider for a moment which kind of rules and principles must exist even in such a setting. How does any form of regulation work? Why does it work? If you delve a little on these questions, you will encounter some of the foundational legal institutions that exist in most legal systems. The concept of property, title, territory and border are there; a principle of autonomy and supreme authority seems to apply to the families; and the institution of contract certainly exists. You will also detect rules of some sort in the form of established customs and you might even identify a principle that says that ‘agreements need to be kept’. Lawyers make use of the Latin phrase ‘pacta sunt servanda’ to express this basic principle. Thus, even in such a rudimentary setting, some customary rules and principles exist even if they are not called ‘law’ or written down in any form.

You will also note that some characteristics of what you may intuitively regard as essential to a legal order are missing: There is no authority ‘above’ the families which makes laws for all, adjudicates conflicts or enforces laws and judgements. There is no government, parliament, court or police system. The rules and principles seem to stem from established practices motivated by the functional needs of cohabitation, pragmatism or mere common sense. Whatever rules exist in this settlement, their validity and effectiveness are routed exclusively in the will of the families and their members.

This settlement resembles many peculiarities of the international legal order. In fact, the settlement resembles a certain depiction of the international legal order that most international lawyers today would call outdated, even though it is precisely this depiction of a primitive legal order that haunts international law even today. If you translate

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the situation of the settlement to the international plane and substitute the families with states, you will get a picture of international law characterised by states as the principal actors. In this depiction, states hold the supreme and exclusive authority over their polities and follow predominantly customary and contractual rules in the relations between them but have no world government above them.

The principle of sovereignty expressed this supreme and exclusive authority of states over their territory, and it confirmed the equal status of all states. It developed its current meaning through the writings of legal and political philosophers between the sixteenth and eighteenth century. Sovereignty continues to be the foundational pillar of the international legal order. For many decades this foundational pillar of international law read: sovereign states are the masters of international law with no world government above them. This meant that the validity of any legal rule depended on the will of states or, conversely, that states are only bound by authoritative legal precepts (norms) that they have consented to. In a famous judgement in the *Lotus case*, the Permanent Court of International Justice in The Hague – the principal judicial organ of the League of Nations, the predecessors to the International Court of Justice (ICJ) of the United Nations (UN) – stated in 1927 (The Case of the S.S. 'Lotus', judgement of the Permanent Court of International Justice, 7 September 1927, 18):

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

### What law is international law?

It is this depiction of international law that often culminated in the question of whether international law was really law. How could international legal norms be effective if their validity depended on the will of states, the very subjects international law should govern? This doubt in the validity and effectiveness of international law ultimately led to a rupture between the two disciplines of international law and international relations theory after the Second World War. Two scholars, Edward Hallett Carr and Hans Morgenthau, suggested around this time that international law was particularly inept for understanding the behaviour of nations. They were disappointed by what they identified as an idealistic belief in international law which, after all, had not prevented – for the second time – a world war. They proposed instead a more 'realistic' assessment of international relations based on power and interest. The founding realist school of international relations theory thus questioned the effectiveness and relevance of international law as a decisive influencing factor for the behaviour of states and for the assurance of international peace and security.

Much has changed since then. The international legal order has diversified in every possible way. There are countless bilateral and multilateral contracts between states (called treaties or conventions in international law), and more than 5,000 intergovernmental organisations and their different organs engage in the regulation and administration of nearly all aspects of international life.

International legal norms pervade global affairs. Every time you travel internationally, send an email, or update your social media profiles, there are not only domestic but supranational legal norms at play, including regional norms as in the European Union. Be it border control, diplomatic and consular relations between countries, the determination of flight and navigation routes, internet regulation, privacy, the use of postal and telecommunication services, industrial standards or cross-border environmental hazards – international law permeates these areas as much as the better-known fields of the protection of human rights, humanitarian interventions and the fight against transnational terrorism.

It is important to understand, then, that the question of whether and how international law matters depends not least on one's conceptual outlook on international life. This chapter introduces you foremost to the (traditional 'occidental' or 'Western') normative understanding of international law in order to show you how international lawyers think and how they use international law. This implies a focus on valid legal rules that authoritatively regulate international life. Yet the understanding of international law as a system of legal norms is not the only possible approach, nor is it the

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solely valid one. In fact, there are numerous other approaches that complement the normative outlook on global law (Walker 2014). It is also important that the occidental depiction of international law is not the only one existing in the world. Scholars from outside the West have shown, for example, how the dominant view of international law neglects important and often earlier contributions to international law by other cultures. Asian, African and Latin American countries should form part of our understanding of international law. For example, international treaties existed already in Africa and Asia over three thousand years ago. Islamic legal thought, present in Persia, India, South Asia and Europe, also had legal regulations of how to conduct hostilities at least since the seventh century. There is not one single conception of international law or international politics.

By focusing on the normative understanding of international law, the chapter takes a modest approach and steers a middle ground. There are also conceptualisations that portray international law as a cosmopolitan order securing solidarity and peace in a 'post-Westphalian' world in which states have largely lost their status as sole sovereigns. On the other hand, there are theories that continue to question the social effectiveness and relevance of international legal norms to shape the behaviour of international actors. In addition, one can also analyse international law through empirical research that uses collected data about the social behaviour of actors as it is done, for example, to scrutinise the effectiveness of human rights norms. Yet, a purely empirical analysis has difficulty in conveying the idiosyncrasy of normative thinking and argumentation in international law. Even if collected data shows instances of non-compliance with human rights norms, it would be wrong to draw conclusions from this about the binding character or range of social effects of these norms.

International lawyers as a particular group of professionals learn techniques to determine which legal norms exist and which are applicable to the relevant actors in a certain situation. Lawyers speak of the sources and subjects of law. They learn how to apply these norms using specific techniques, such as interpretation or the balancing of conflicting rights. These professional techniques are not value-neutral or objective but involve subjective choices and politics. An approximation to objectivity and ideals of justice is achieved only through specific procedures that need to be followed, recognised modes of argumentation and particular processes of decision-making. In a nutshell, international law consists of certain conventions on argumentation and modes of conflict resolution that some regard as a craft, others as an art. Most likely it is both.

## The contents of international law

One distinguishes broadly between domestic, regional and (public and private) international law. Domestic law stems from domestic lawmakers and regulates the life of the citizens of a particular state. Regional law, such as European Union law or the law of regional human rights mechanisms, stems from regional intergovernmental institutions and addresses the governments and individuals of a particular geographical region or legal regime. Public international law is the subject of this chapter and addresses – in most general terms – relations involving states, intergovernmental organisations and non-state actors, which include today individuals, non-governmental organisations (NGOs) and private corporations. Private international law concerns conflicts of laws that may arise in cases where the domestic laws of different states could apply, for example in cases of cross-border e-commerce, marriages or liabilities.

Within public international law, a distinction is traditionally drawn between the law of peace and the law of war (humanitarian law). The law of peace regulates peaceful relations and includes such subject matters as international treaty law, the law of diplomatic and consular relations, international organisation law, the law of state responsibility, the law of the sea, the environment and outer space or international economic law.

International humanitarian law (IHL) is the law of armed conflicts (*jus in bellum* – the law applicable in war) and regulates the conduct of international and non-international hostilities. In times of war, the use of force, including the killing of human beings, is not prohibited. The legal regulation of armed conflicts goes back to the mid-nineteenth century and comprises a large body of customary rules and a series of important conventions and additional protocols to these conventions adopted primarily in The Hague and Geneva. International humanitarian law regulates, among other things, the methods and means of warfare and the protection of certain categories of persons – for example, the sick and wounded, prisoners of war and civilians. More specific treaties prohibit the use of certain

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types of weapons (such as chemical or biological weapons, mines or cluster munitions) or the protection of cultural property during armed conflict. Much of the development and codification of this body of law is the merit of the International Committee of the Red Cross, founded in 1863 by Henry Dunant, which is a private humanitarian institution based in Geneva and forms part of the International Red Cross and Red Crescent Movement.

At the transitional points between the law of peace and the law of armed conflict lies the legal regulation of the resort to force (*jus ad bellum* – the law to engage in war) which concerns the conditions that need to be met to use force legally as, for example, in instances of self-defence (Article 51, UN Charter). More recently, scholars also speak of the regulation of the transition to peace after the end of armed conflicts (*jus post-bellum* – the law after war) which includes questions over how to end armed conflicts, transitional justice and post-war reconstruction.

The strict distinction between the law of peace and the law of armed conflict has been somewhat blurred with the rise of international human rights law and international criminal law. Human rights law builds on and develops fundamental principles of humanitarian law for the protection of individuals. On the other hand, human rights have considerably influenced the refinement of humanitarian rules for the protection of combatants and civilians. International criminal law has seen a rapid development after the end of the Cold War first with the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda and then with the establishment of the International Criminal Court in 2002.

## From 'no world government' to global governance

Consider now what it meant to establish, for example, an international legal prohibition of torture. Torture was a common and legal method of interrogation before the seventeenth century. A legal prohibition of torture would mean that governments are obliged by international law not to allow their officials to use torture. How did an international legal norm prohibiting torture develop? What were its effects?

*Subjects: Who makes international law and to whom does it apply?*

You have seen already that traditionally only states (for historical reasons also the Holy See/Vatican and the Maltese Order) were subjects of international law and bearers of privileges and obligations. Privileges included sovereign status, immunities, jurisdiction or membership in international organisations, for example. Obligations towards other states arose from voluntary contracts, from the principle of non-intervention or from responsibilities for wrongful acts.

The status of a sovereign state implied full membership in the international society of states. It is a contentious issue in international law whether a territorial entity gains the legal status of a sovereign state depending only on a number of factual criteria (such as the existence of a population, territory, effective government and capacity to enter into international relations) or whether this requires also a formal recognition by other states. Already the criteria of statehood are contentious, and in practice it is not always easy to determine whether all conditions are met. In addition, for political reasons states have sometimes recognised other states that did not fulfil one or more criteria of statehood, or they have not recognised states despite them fulfilling all criteria. After the break-up of the former state of Yugoslavia, for example, Kosovo declared its independence from Serbia in 2008. Serbia has not formally recognised Kosovo as an independent sovereign state. Neither have a number of other states such as Russia, China and Spain, which all try to control movements for regional independence or autonomy in their own territory.

Coming back now to the example of the prohibition of torture, which options did individuals have under international law to seek redress for acts of torture? If a foreigner was tortured by officials of another state, the home state could complain to the latter. The individuals themselves, however, could do very little under international law, for individuals were not subjects of this body of law. Even worse, if a state tortured its own citizens, this was an internal matter in which other states could not intervene.

*Sources: How is international law made?*

The most important and most concrete sources of international law are bilateral and multilateral treaties. Multilateral

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treaties are usually prepared during long negotiations at diplomatic state conferences where a final treaty text is adopted and then opened for signature and ratification by states. When an agreed number of states have ratified the treaty, it enters into force and becomes binding on the member states.

Article 38 of the Statute of the International Court of Justice lists as sources of international law on which the court may rely in its decisions: treaties, customary international law, general principles of law that exist in most domestic legal systems (such as behaving in 'good faith') and, as a subsidiary means, also judicial decisions and scholarly writings.

Customary practices are even today still a common and highly contentious source of law. Customary law refers to the established practices of states that are supported by a subjective belief to be required by law. If a customary rule exists, it is binding on all states except where a state has persistently objected to this rule. You can imagine already that the deduction of legal rules from social practices and subjective beliefs poses many difficulties and bears many insecurities regarding proof and actual content. Also during diplomatic conferences that prepare a treaty text, many difficult compromises are brokered. To paraphrase a saying that is often attributed to Otto von Bismarck, laws are like sausages. It is better not to see them being made.

In the context of our example of the prohibition of torture, imagine the following scenario: state A has signed and ratified the International Covenant on Civil and Political Rights, which contains a prohibition of torture in Article 7, and is also party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This country fights terrorism and brings suspected terrorists to secret prisons in countries which are not party to any of the above conventions. In these prisons, the suspects endure intense interrogations which include sleep deprivation, waterboarding (causing the sensation of drowning) and other measures.

As an international lawyer faced with this case your starting point would be the aforementioned international treaties that contain a prohibition of torture. You would need to determine whether the interrogation measures amount to torture. Here, the codified definition in international treaties and the interpretation of this definition in previous cases can give you important guidance. You would also need to determine whether the particular state in question has ratified the pertinent treaty or treaties. In our example, the situation is complicated by the fact that both treaties limit the territorial applicability of the treaty to all individuals within a state's territory and subject to its jurisdiction. Hence one could argue that instances of torture on the territory of non-state parties do not fall within the ambit of the treaties. Also a counterargument is possible. One could make a case for the extraterritorial application of the treaty if the acts of torture on foreign soil were effectively controlled by a state that is a member to the treaty.

You would then proceed to see whether a customary rule exists that prohibits the use of torture. Even if the treaties prohibiting torture have not been ratified by a state, you could argue that the treaty has codified an already existing customary rule or, if a large majority of states has ratified the treaties, that this is evidence that a customary rule has been formed. In light of horrendous historical experiences, you may also argue that the prohibition of torture is of such fundamental importance that today no derogation from this rule is permitted. In other words, you would argue that the prohibition of torture is a peremptory rule of international law (*ius cogens* – peremptory law) that does not permit any exception.

You can see now how the early idea of state consent as a necessary requirement for an international rule still permeates these argumentations. The main difficulty often consists in establishing state consent or, at times, in constructing alternatives for it.

## *Global organisation: The United Nations era*

The end of the Second World War and the end of the Cold War are probably the most significant historical watersheds in the development of recent public international law. The end of the Second World War in 1945 led to the establishment of the United Nations and the rapid development of several areas of international law, including human rights law, international criminal law and international economic law.

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The United Nations is the most important global intergovernmental organisation with major offices in New York, Geneva, Nairobi and Vienna. It was established with the principal aim to ensure peace and security through international co-operation and collective measures. As of 2017, it has 193 member states. Article 2 of the UN Charter, the founding treaty of the United Nations, confirms as guiding principles the sovereign equality of the member states, the peaceful settlement of disputes, the prohibition of the use of force and the principle of non-intervention.

Delegates of all member states meet once a year during the General Assembly to discuss pertinent issues of world politics and vote on non-binding resolutions. The Security Council is the highest executive organ of the United Nations in which the representatives of ten selected member states and five states with permanent seats decide on issues of peace and security through binding resolutions, which may result in economic sanctions or even military actions. The 'permanent five' (the People's Republic of China, France, Russia, the United Kingdom and the United States) hold the privilege of a veto right allowing them to prevent the adoption of resolutions of the Security Council on any substantial (as opposed to procedural) issues. Major reform initiatives of the composition or voting procedures of the Security Council have been unsuccessful so far. This taints the effectiveness and the democratic legitimacy of the Security Council and, especially during the Cold War, it severely constrained the Security Council as two of its key members (the United States and the Soviet Union) were engaged in an ideological conflict. Politically, however, the right to veto was a necessary concession to ensure the participation of the most powerful nations in a world organisation.

Numerous principal and subsidiary UN organs and specialised agencies engage in the application, enforcement and development of international law. This work comprises, for example, classical legal work in the International Law Commission and special committees of the General Assembly, practical work in the field and diplomatic efforts by Offices of High Commissioners and their staff, or actions taken by the Security Council. All of these bodies, and many more, promote and shape international law in various ways. In the International Law Commission, for example, a group of experts create reports and drafts on specific topics that are then submitted to a committee of the General Assembly and can provide an important basis for later treaty negotiations. The Offices of the High Commissioners for Human Rights and Refugees do important work in the field where their staff endeavour to uphold international law often in crisis situations. Their experiences influence also subsequent interpretations of international law, for example, regarding who qualifies as a refugee. The United Nations Educational, Scientific and Cultural Organization (UNESCO) fulfils a crucial function in disseminating knowledge about international law by promoting education and research on human rights, justice and the rule of law.

## *Community and governance: The changing structure of international law*

The existence of a world organisation, the legal prohibition of the use of force, the establishment of a system of collective security and the protection of human rights have caused fundamental changes in the international legal order. International lawyers and politicians speak frequently of the 'international community' that co-operates to pursue community interests which cannot be achieved by single states alone. These community interests may range from environmental challenges and cultural heritage to issues of human security.

How much the meaning of sovereignty has changed, one can see, for example, in the principle of a shared 'responsibility to protect' (R2P). According to this principle, states have an obligation to prevent gross human rights violations not only at home but also abroad, if necessary through forceful United Nations measures. The protection of the individual from severe atrocities has thus become a matter of national, regional and international concern. This means that states can no longer claim that gross human rights violations are internal matters and that they are protected by their sovereignty.

Today there are countless actors that engage in the making, interpretation, use and enforcement of international norms. States still are the major international actors and the principal makers and addressees of international norms. Yet the bureaucracies of intergovernmental organisations and their organs, numerous international, regional and domestic courts and tribunals, non-governmental organisations and even groups or single persons (so-called 'norm entrepreneurs') engage in the pronouncement, interpretation and dissemination of international legal norms, standards

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and other types of 'soft law'. And, they often do this without, or even against, the will of states. For example, a NATO-led intervention in Kosovo in 1999 was executed without the authorisation of the UN Security Council. NATO (the North Atlantic Treaty Organization) is a collective security organisation, effectively a military alliance, of Western states. It was originally created to help contain the spread of communism in Europe during the Cold War but has endured in the years since. Its actions in Kosovo contributed to the establishment of the International Commission on Intervention and State Sovereignty which was a private expert group under the auspices of the Canadian Government to respond to UN Secretary-General Kofi Annan's challenge on how to respond to large-scale violations of human rights and humanitarian law. The commission produced a report on 'The Responsibility to Protect' to which both the UN Security Council and the General Assembly have repeatedly referred to and which is used as an argumentative tool by civil society actors, including many non-governmental organisations. You can thus see how a private initiative has transformed into public normative authority.

This multitude of norms, legal regimes, actors and normative processes is reflected in more recent approaches to international law that focus more on pluralistic governance processes than on a unified legal system, and more on informal law-making than on formal sources.

## The functioning of international law

In order to understand how different actors make normative claims and how they use international law, the aforementioned broader perspectives offer valuable insights. The emergence of a norm like the prohibition of torture and its influence start long before such a norm is codified in an international treaty. Political scientists and legal scholars have described a normative 'life cycle' that relies on a (transnational) social process which is characterised by an initial norm emergence, followed by early adoption of this new norm, spreading of this acceptance and ultimately by widespread internalisation of the norm and compliance with it.

For the first stage of norm emergence, the influence of so-called 'norm-entrepreneurs' (such as private individuals, lobbying groups, non-governmental organisations) is essential. Through a combination of means (e.g. framing of issues, campaigning, empathy appeal, persuasion, shaming, claiming, declaring, etc.) and on different organisational platforms, the norm-entrepreneurs try to enunciate norms and persuade governments to embrace them. In the case of torture, this meant that even literary novels and political pamphlets contributed to a change in social perception and an increase of empathy with victims which in turn led to the social unacceptability of torture.

Once a 'critical mass' of actors have adopted a new norm prohibiting torture or of a responsibility to protect, a threshold or tipping point is reached. At this second stage, the norm starts to spread through international society. Here an active process of transnational – domestic, regional and international – socialisation takes place which, primarily, states, international organisations and networks of norm entrepreneurs carry forward. Those state and non-state actors that have endorsed the norm engage in a process of redefining what qualifies as appropriate behaviour within international society. Social movement theory, which studies mobilisations in society to make collective claims about social changes, provides valuable insights on the conditions and effects of this process.

A third phase of internalisation or obedience is reached when norms 'achieve a "taken-for-granted" quality that makes conformance with the norm almost automatic' (Finnemore and Sikkink 1998, 904). If this process succeeds, norms such as the prohibition of torture become truly transnational in the course of this process. They exert normative force domestically through constitutional guarantees and through the work of civil society groups. In addition, the norms are invoked in regional and in international human rights fora such as regional and international courts or human rights bodies. Thus, these norms acquire a transnational character through interactions between a variety of actors – both state and non-state – across issues areas and across historic public/private and domestic/international dichotomies (Koh 1997, 2612).

This, however, does not mean that international law is a guarantor for a just global order. Much rests on the will and interests of the actors involved. International law itself cannot solve injustices and cannot manufacture solutions. Ultimately, many of the politically charged issues simply reflect in the language of international law. For example, we have seen already that international law prohibits the use of force by states in peace times except when the forceful

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measures have been authorised by the UN Security Council or when a state acts in self-defence (Article 51, UN Charter). In this scenario, not only politicians but also international lawyers will argue in legal terms whether the use of force against an (allegedly) imminent terrorist attack that has not *yet* occurred can be justified as a form of 'pre-emptive' self-defence. Similarly, since it is not illegal to kill enemy combatants during an armed conflict, international lawyers will exchange legal arguments about whether terrorists qualify as combatants and whether the killing of terrorist suspects in a foreign country is permissible under international law because of a continuing global war on terror that amounts to a state of armed conflict. Finally, also in the ambit of our example on the prohibition of torture, lawyers will argue about whether the situation of a hidden ticking bomb might exceptionally permit torturing the apprehended attacker if this could save innocent lives.

This is not to say, however, that international law is inherently indeterminate or arbitrary. The normative force of international law lies in the creation of new argumentative needs, in the possibility to challenge established positions, in the specific required modes of argumentation, in the institutionalised fora for conflict resolution and in the justificatory potential that rests in law.

### Conclusion

Although questions about the relevance and effectiveness of international law persist, especially when powerful nations use their political power to 'bend' international law, today hardly anyone declares international law as irrelevant. Accordingly, the discussion has shifted from 'whether international law is really law' to 'how do international norms matter'. Also the divide between international law and IR theory has been closing for some time now. Liberal approaches to IR acknowledge that norms have an important role to play for the shaping of state preferences and in international co-operation to attain common aims by setting common normative frameworks. The English school argues for an international society in which states through interaction naturally create rules and institutions, as exemplified in the example of the families at the beginning of this chapter. The constructivist school focuses on social processes, including legal norms that shape the self-understanding, role, identity and behaviour of actors. Social movement theory analyses the creation and effects of group organisation in civil society and how campaigning, for example for human rights, gains social force and translates into political results.

International lawyers, on the other hand, have been opening up towards empirical, sociological and political approaches to understand how norms develop and how actors exert normative authority. This goes beyond understanding international law exclusively as a coherent legal system with recognised sources of law and specific techniques of legal practice. International lawyers increasingly adopt a more pluralistic and holistic outlook and an understanding of international law as a social process. This social process results in normative regulations that function as standards of conduct to guide and evaluate the behaviour of international actors. That the individual has acquired such a prominent role in international law as a central subject beyond state confines is truly remarkable. Today, each individual has rights that permeate the international and that are fundamentally embedded in an – albeit imperfect – global law which in turn permeates each of our lives. This law is not static but in a constant process of development. It requires to be made effective, challenged, defended and reformulated in order to fulfil its emancipatory potential

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