Essays on International Law

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By

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To my Mum and Dad for their kind assistance in the preparation of these essays.

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PREFACE

The idea for this book of essays came from a combination of 2 sources. First, I have enjoyed teaching international law to students of the Master of Laws Degree, even though I did not study the subject at this stage of my career. Second, I realised that all good legal scholars write essays – for instance Professor Herbert Hart's *Essays in Jurisprudence and Legal Philosophy* – which *was* studied during my time as a student of the law. So, why not *Essays on International Law*?

International law is to legal studies as the church organ is to musical instruments. Just as the latter has three-stave reading and performance, together with the utilisation of both hands and feet and the production of a variety of sounds, which can blend together in a superb way, so the former has a variety of legal instruments, techniques, elements, and variables that can be combined to form an interesting analysis. Similarly to international law, I only started to learn the church organ at the age of 26 – although I was already a proficient pianist. After a few years of 'teething' with the co-ordination of 2 manuals and the pedal, I have not looked back.

The institutional aspect of the subject takes a fairly high profile within the essays. The United Nations, the International Labour Organization, the World Trade Organization and other structures of this sort play a major part in the regulation of the content of the law over their functional areas. Furthermore, the working of these entities is inherently interesting. I would like this to be evident through the crafting of the essays.

The essays do not pretend to be comprehensive. They are comparable neither to a textbook nor to a detailed research work. Each essay stands alone as an area of interest to the author, over which I would like to share my observations and ideas with readers. No doubt, not all readers will agree with everything stated in all of the essays – but difference of view, provided that it is genuinely held and grounded in logical argument, is one method of progress in any subject area. Above all, I hope that you find your journey through the essays an enjoyable experience.

Graeme Baber,
October 2016.

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ESSAY ONE

THE CHARACTER OF INTERNATIONAL LAW

'International law' comprises rules that regulate transactions which have at least one cross-border element, i.e. that are not entirely within a single country. Thus, even if the parties to the transaction reside in the same jurisdiction, it is classified as an international one if assets that are its subject are situated elsewhere; for instance, the sale of a house in San Sebastián between a seller and a purchaser who reside in Bayonne and Biarritz, respectively, is an international transaction. If, by contrast, the property is located in Strasbourg, then the transaction would be a domestic one – even though the parties and the asset are further apart than in the first case.

International law compasses a variety of topics. For instance, it includes commercial law, labour law and the law of intellectual property – as long as there is a cross-border element in the transactions that those laws regulate. Therefore, it is a wide, varied specialty.

The subject is often subdivided into public and private international law. The former concerns rules that regulate relations between countries; the latter precepts which administer relations between persons. In its narrow sense 'private international law' is synonymous with the concept of the 'conflict of laws', although the former may be wider than the latter. Private international law may, for instance, include a situation in which a multilateral agreement gives rise to rights upon which private persons may rely in their national courts – even though this is beyond the scope of the conflict of laws.

Whilst national legal systems have differing characteristics – for instance, there are civil law and common law systems, the latter of which employs the doctrine of judicial precedent and the former of which does not – there is a single structure for international law. However, this construction is diversified, its components depending upon the identity of the part of that law that is under consideration and the time at which the observations are made.

An example of the cross-sectional comparison is that between international trade law and the law of foreign investment, at the time of

writing. The main contributors to the former are the agreements in the annexes to the Agreement Establishing the World Trade Organization (WTO), especially the General Agreement on Tariffs and Trade (GATT). Other than those in Annex 4, all of these agreements are binding upon all countries that are Members of the WTO.[1] As most states are Members, these compulsory compacts form the basis for international trade law. By contrast, the law of foreign investment comprises several sources of law. These include one multilateral convention,[2] decisions of the International Court of Justice (ICJ), Bilateral Investment Treaties (BITs) to the extent that provisions are similar across most of them, and the content of arbitral awards which interpret the BITs – in so far as this is consistently applied. The changing content of international law with time can be seen in a commercial context, with the decline of the medieval law merchant as national commercial law developed, the introduction in the 19th century of the multilateralist approach to the conflict of laws, and the subsequent production of international legal instruments – such as conventions and model laws – a process called 'harmonisation'.

Over some topics of international law, it is possible to immediately identify the relevant legal provisions. The multilateral trade agreements that the preceding paragraph mentions are an example of this – as long as these rules can clearly be applied to the facts of the case. Likewise, the conventions of the International Labour Organization (ILO) need to be implemented by Members of the ILO that have ratified them, thereby forming a body of international labour law for relations between these countries.

In other areas of the subject, it may be necessary for the law to be discovered through a careful inspection of its possible sources. One example of this is the law on the level of compensation which is payable when a state expropriates property owned by non-residents. Cases of the ICJ, BITs and arbitral awards that interpret these provide an assortment of guidance on this issue – and different standards are applicable in different circumstances.

> [T]here is no clear principle as to compensation for nationalisation in international law at the present time. Though most investment treaties

[1] Agreement Establishing the WTO (Marrakesh, 1994), Article II.2. The Agreements in Annex 4 are only binding upon those Members which have accepted them (Agreement Establishing the WTO, Article II.3).

[2] This is the ICSID Convention. 'ICSID' is the International Centre for Settlement of Investment Disputes, which is part of the World Bank.

> require the payment of full market value as compensation, there is as yet no sufficient uniformity of practice to indicate a set pattern on this matter.[3]

It is sometimes difficult to determine whether or not an item is an element of international law. For a rule to be considered to be part of international custom – which is an element of the wider law – there needs to be an act that occurs repeatedly, and an acceptance of this pattern of behaviour from relevant parties because they believe it to be an accepted norm rather than because they tolerate it out of courtesy.

The Universal Declaration of Human Rights (UDHR) provides an example of this determination. Unlike its daughter instrument, the International Covenant on Economic, Social and Cultural Rights – Article 2(1) of which requires its States Parties to take measures, including through statutory law, to progressively achieve the realisation of the rights contained therein, the UDHR does not provide a means of its enforcement in the countries that have ratified it.

The repeated act in the case of the UDHR is the application of the rights embodied therein. The acceptance of the pattern of behaviour is evidenced by the fact that several countries have adopted the UDHR as part of their national law, and by statements from the International Conference on Human Rights (ICHR) and in *Filartiga v. Pena-Irala*. The Final Act of the ICHR contains the following pronouncement.

> The International Conference on Human Rights … Solemnly proclaims that: … 2. The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes and obligation for the members of the international community; … .[4]

In *Filartiga v. Pena-Irala*, Judge Kaufman (delivering the opinion of the court) observes that the United Nations considers a Declaration to be a 'formal, solemn instrument' which 'creates an expectation of adherence' and may become binding as 'the expectation is gradually justified by State practice'. The judge notes that writers concur with this position.

> [A] U.N. Declaration is … "a formal solemn instrument, suitable for rare occasions when principles of great and lasting importance are being

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[3] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010), 410-411.

[4] United Nations, Final Act of the International Conference on Human Rights (New York: United Nations Publications, 1968), II. Proclamation of Teheran, para.2, 4.

> enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly … the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement', but is rather an authoritative statement of the international community." E. Schwelb, *Human Rights and the International Community* 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 ESCOR, *supra*. [S]everal commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law. Nayar ["Human Rights: The United Nations and United States Foreign Policy," 19 *Harv.Int'l L.J*. 813] at 816-817 [(1978)]; Waldlock, "Human Rights in Contemporary International Law and the Significance of the European Convention", *Int'l & Comp L.Q.*, Suppl. Publ. No. 11 at 15 (1965).[5]

Thus, the acceptance of the norm of application of the UDHR is inherent in the nature of the instrument as a Declaration. Customary law is created as countries apply the rights contained therein. The judgment in *Filartiga v. Pena-Irala* also includes the following statement.

> [A]lthough there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter [of the United Nations], there is at present no dissent from the view that the guaranties include … the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec 10 1948) which states … "no-one shall be subjected to torture." The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basis principles of international law." G.A.Res. 2625 (XXV) (Oct 24, 1970).

It is submitted that this argument is not entirely accurate, as UN Resolution 2625 (XXV) is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations – not the UDHR, and it is the principles 'embodied in this Declaration' that are those of international law. Resolution 2625 states the following.

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[5] 630 F.2d 876, *Dolly M. E. Filartiga and Joel Filartiga v. Americo Norberto Pena-Irala*, United States Court of Appeals, Second Circuit, June 30, 1980, para.26.

> The General Assembly … Having considered the principles of international law relating to friendly relations and co-operation among States, … 3. Declares further that: The principles of the Charter *which are embodied in this Declaration* constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.[6]

Nevertheless, as this rule applies to the Declaration on Principles of International Law, it seems logical to extend it to the UDHR – as the latter has similar status to the former as a United Nations Declaration. Hence, the argument is as follows.

1. The Charter of the United Nations is binding upon all Members of this organisation, of which, at the time of writing, there are 193 – which constitute most of the world's countries and population.[7]
2. The Charter proclaims human rights and fundamental freedoms.

> The Purposes of the United Nations are: … 3. To achieve international cooperation in … promoting and encouraging respect for human rights and for fundamental freedoms for all … .[8]

3. The UDHR embodies the principle of the Charter, in point 2 above.

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights … Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations , the promotion of universal respect for and observance of human rights and fundamental freedoms, Whereas a common understanding of these rights and freedoms is of the greatest importance for the realization of this pledge, Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations … .[9]

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[6] United Nations, Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, Annex, 2, 10. Emphasis added.

[7] "Growth in United Nations membership, 1945-present", United Nations, accessed August 18, 2015, http://www.un.org/en/members/growth.shtml#text.

[8] United Nations, Charter of the United Nations and Statute of the International Court of Justice (San Francisco, 1945), art.1(3), 3.

[9] United Nations, Universal Declaration of Human Rights, Preamble.

4. The principles of the Charter that the Declaration on Principles of International Law contains which are in accordance with the Charter of the United Nations embodies, are principles of international law.[10]
5. The UDHR is of similar status to the Declaration on Principles of International Law.
6. Therefore, the principles of the Charter that the UDHR embodies should be principles of international law.
7. The latter are the rights and freedoms contained within the UDHR.

Thus, there are arguments for the UDHR to be both customary international law and principles of international law – which should ensure its standing in relation to the Members of the United Nations.

Who may rely on provisions of international law?

If rights provided by international law may be relied upon by individuals in their national courts, then this law would have wider effect than if it can only be relied upon by countries. The situation is variable across the subject. Some examples are as follows.

Of the currency exchange obligations that the Articles of Agreement of the International Monetary Fund (IMF) places on the IMF's members, only that in Subsection 2(b) of Article VIII gives rise to private rights.[11] This provision enables a person to bring about recission of a foreign exchange contract, or to acquire damages after that contract's performance, if it contravenes the terms of the subsection,[12] which are as follows.

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. …[13]

The direct effect of provisions of the General Agreement on Tariffs and Trade (GATT) was at issue in *Finance Ministry v. SpA Manifattura Lane*

[10] See above.
[11] Ray August, Don Mayer and Michael Bixby, *International Business Law: Text, Cases, and Readings* (Harlow: Pearson Education Limited, 2013), 322.
[12] August, Mayer and Bixby, *International Business Law*, 314.
[13] IMF, Articles of Agreement, amended to January 26, 2016 (Washington, D.C.: International Monetary Fund, 2016), art.VIII, s.2(b), 23.

Marzotto.[14] The court ruled on whether or not SpA Manifattura Lane Marzotto could rely on Section 2 of Article III of the GATT[15] in the national courts, i.e. whether it was directly effective for private parties. This provision is as follows.

> The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. … .[16]

In *Finance Ministry v. SpA Manifattura Lane Marzotto*, the company, an Italian manufacturer of woollen goods, was ordered to pay a duty to the Italian Finance Ministry on the importation of wool from Australia. The company claimed that this tax was illegal, because Australia was a member of the GATT, and, according to the principle of equality of treatment, discrimination between imported and domestic manufactures was impermissible.[17]

The Court of Cassation held that the relevant provision of the GATT had become part of the Italian legal system and applied immediately, without the need for further legislation. Thus, this rule directly generated rights and duties for individuals. Consequently, goods imported from other contracting parties to the GATT were not subject to duties that were higher than those in effect on the date of the Agreement's conclusion.[18]

It is submitted that there is a lack of consistency between the right of individuals to rely in their national courts on provisions of the IMF's Articles of Agreement and of the GATT. It would be helpful for issues of direct effect over the different areas of international law to be clarified – although it is unclear who would have the authority to do this – the United Nations? The ICJ?

Furthermore, it might be argued that a division of the ICJ should be set up in order to resolve disputes that concern matters of international law

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[14] Case No. 1455, 77 ILR 551 (1988), Italy, Court of Cassation (Joint Session), 21 May 1973.

[15] The judgment for the case refers to 'Article III(1)(b) of the GATT'. The GATT Agreement does not contain an Article III(1)(b); Article III(2) is similar to the Court of Cassation's description of Article III(1)(b), and is therefore considered to be the provision to which the Court was referring in the judgment.

[16] GATT, The Text of the General Agreement on Tariffs and Trade (Geneva, 1986), art.III(2), 6, as amended by the Agreement Establishing the WTO (Marrakesh, 1994), Annex I, GATT 1994, para.2, 24.

[17] 77 ILR 551, *Manifattura*, 551.

[18] 77 ILR 551, *Manifattura*, 551.

which involve rules upon which private persons can rely directly.[19] At best, this could ensure the application of a consistent standard across all cross-border issues and countries. This would probably be contentious to set up and expensive to administer – and who would pay the bill?

Fora for claims under international law

In *The Greco-Bulgarian "Communities" case*,[20] the Permanent Court of International Justice[21] held that the provisions of a treaty to which the relevant countries are contracting parties prevail over those of "municipal law". In respect of customary international law, the majority of countries determine that this is adopted to the extent that it is consistent with prior national law or judicial decisions, whilst a minority of courts – such as those in the United Kingdom and the British Commonwealth – consider this law to be applicable only from the point of it being incorporated into legislation or case law or from its established local use.[22]

In addition to national courts, and to the ICJ, there are regional and topical courts that may take points of international law from appellants, such as the Central American Court of Justice and the International Criminal Court, respectively. Furthermore, international institutions and treaties may introduce their own mechanisms for dispute settlement, on issues that relate to the relevant instruments. An example of each of these two follows. The Agreement Establishing the WTO introduced the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), in order to administer the resolving of difficulties arising from the majority of the treaties that came into force with the Agreement.[23] The Optional Protocol

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[19] At present, only countries are eligible to be parties in cases before the ICJ (Statute of the ICJ, Article 34(1)).

[20] *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-Sur-Seine on November 27th, 1919 (Question of the "Communities")*, Advisory Opinion No. 17, PCIJ Ser. B No. 17 (1930).

[21] The Permanent Court of International Justice was the forerunner of the ICJ.

[22] August, Mayer and Bixby, *International Business Law*, 29.

[23] Agreement Establishing the WTO (Marrakesh, 1994), Article III.3, and Annex 2, Article 1(1) and Appendix 1. The DSU covers the following items: the Agreement Establishing the WTO, and the instruments in Annexes 1A (Multilateral Agreements on Trade in Goods), 1B (General Agreement on Trade in Services), 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights, 2 (the DSU), and 4 (the Plurilateral trade Agreements) of the Agreement Establishing the WTO; Agreement Establishing the WTO (Marrakesh, 1994), Appendix 1.

to the International Covenant on Economic, Social and Cultural Rights (ICESCR) considers communications that an individual or a group submits (or which is presented on behalf of an individual or a group) under a contracting state's jurisdiction, in which the applicant claims to be a victim of a breach by that country of any of the rights that the ICESCR sets out.[24]

The number and variety of judicial sources of international law inhibits the generation of a comprehensive case law. This contrast with national and regional sources of case law; for example, European Union case law is published by the Court of Justice of the European Union and its associated institutions,[25] and is available on-line free-of-charge on EUR-Lex – a wonderfully concise situation for reviewers of these rules or aspects of them.

Perception of international law

In the European cases of *Costa v. E.N.E.L.*[26] and *Simmenthal S.p.A.*,[27] in which the European Court of Justice[28] determined that European Union law is a superior source of law to the laws of the Member States in the sense that the latter must comply with it,[29] and that Treaty provisions and

[24] United Nations, Optional Protocol to the ICESCR, Article 2. The Committee on Economic, Social and Cultural Rights will not consider a communication, unless it has found all domestic remedies that are available to the applicant to have been exhausted – except when the application of these methods of redress "is unreasonably prolonged" (United Nations, Optional Protocol to the ICESCR, Article 3(1)).

[25] These are the General Court and the Civil Service Tribunal.

[26] *Flaminio Costa v. E.N.E.L. (Ente Nazionale Energia Elettrica)*, Case 6/64, [1964] ECR 585.

[27] *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, [1978] ECR 629.

[28] The European Court of Justice has been renamed the Court of Justice of the European Union. These cases were determined at the time of the European Economic Community, i.e. prior to the European Union.

[29] The Court made the following comments: "By creating a Community of unlimited duration, having … real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. … [T]he law stemming from the Treaty [establishing the European Economic Community], an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions … without being deprived of its character

directly applicable measures disapply any conflicting rule of national law and preclude the valid enactment of new domestic laws that are incompatible with European provisions.[30] Whilst the position of international law in relation to regional and national laws is not as clear as that of European Union law in respect of the provisions of the Union's Member States, there is a perception that the former is a superior source of law to regional and national laws. Notwithstanding this, international law does not unequivocally hold such a position.

The Court of Justice of the European Union, together with its associated courts,[31] has jurisdiction to rule on matters that concern the interpretation of European Union law.[32] By contrast, the ICJ has a narrower jurisdiction over international law than the Court of Justice of the European Union has over European Union law. Article 36 of the Statute of the ICJ describes this Court's competence, as follows.

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
> 2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation.

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as Community law and without the legal basis of the Community itself being called into question." [1964] ECR 585, *Costa v. E.N.E.L.*, 593-594.

[30] The Court stated: "[I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty [establishing the European Economic Community] and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but … also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions." [1978] ECR 629, *Simmenthal S.p.A*, para.17, 643.

[31] See note 25.

[32] For example, Article 267 of the Treaty on the Functioning of the European Union provides the Court with jurisdiction to give preliminary rulings on issues that concern the interpretation of this Treaty and of the Treaty on European Union, and on the validity and interpretation of acts of the European Union's institutions, agencies, bodies and offices.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

…

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Thus, although the ICJ is recognised to be the main authority over issues of interpretation of international law, it is not the only one. Those international organisations that have become "specialized agencies" of the United Nations[33] may defer to the ICJ for the resolution of issues over their areas of jurisdiction. For instance, under the 'Complaints of non-observance' procedure in Articles 26 to 34 of the Constitution of the ILO,

[33] Article 57(1) of the Charter of the United Nations states: "The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.". Article 63 of the Charter of the United Nations declares: "1. The Economic and Social Council [of the United Nations] may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. … 2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly [of the United Nations] and to the Members of the United Nations.". The specialized agencies comprise the ILO, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the International Civil Aviation Organization, the IMF, the International Bank for Reconstruction and Development (IBRD), the World Health Organization, the Universal Postal Union, the International Telecommunication Union, and any other agency that relates to the United Nations in accordance with Articles 57 and 63 of its Charter (The Convention on the Privileges and Immunities of the Specialized Agencies, Article 1(1)). In this last category are the following institutions: the remainder of the World Bank Group (the IBRD is listed above) – i.e. the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes, the International Fund for Agricultural Development, the International Maritime Organization, the United Nations Industrial Development Organization, the World Intellectual Property Organization, the World Meterological Organization and the World Tourism Organization ("Funds, Programmes, Specialized Agencies and Others", United Nations, accessed March 29, 2016, http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html).

the ICJ has the final word in respect of official allegations against a Member of the ILO, of non-compliance with a Convention that the ILO has published, by another Member of that organisation.[34] If the international organisation is not a specialized agency of the United Nations, then it is free to use a dispute resolution mechanism other than the ICJ in respect of the area of international law over which that entity has jurisdiction. The clearest instance of this is the WTO's use of the DSU, which relates to most of the agreements in the Annexes to the Agreement Establishing the WTO.[35] Even amongst the specialized agencies, the ICJ may not be the forum of choice for resolving disputes. The Freedom of Association Committee of the Governing Body of the ILO is established to determine whether or not any national legislation or practice observes the principles of collective bargaining and freedom of association that the relevant ILO Conventions contain.[36]

In addition, a crucial difference between the Court of Justice of the European Union in respect of European Union law and the ICJ with regard to international law, is that the Member States are bound by the jurisdiction of the former over the whole body of European Union by virtue of the provisions of the European Union Treaties,[37] whilst paragraph 2 of Article 36 of the Statute of the ICJ requires countries to make a declaration – which may be limited in territorial and/or temporal scope – that gives the ICJ compulsory jurisdiction over the whole field of international law.[38] In the case of the European Union, the 'consent' occurs during the accession period of new Member States – which are required to subscribe to the whole body of extant European Union law in order to proceed with Membership. This 'consent' continues during the membership period – the relevant country's revocation of any instruments

[34] ILO, Constitution of the International Labour Organisation and selected texts (Geneva: International Labour Office, 2010), art.31, 19.
[35] See note 23 and its accompanying text.
[36] ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth (revised) edition (Geneva: International Labour Office, 2006), para.6, 8. The 'relevant ILO Conventions' are the Freedom of Association and Protection of the Right to Organise Convention 1948 (No.87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98) (Digest of decision and principles of the Freedom of Association Committee, note 1, 1).
[37] These treaties are the Treaty on European Union and the Treaty on the Functioning of the European Union.
[38] See above in this section, for Article 36(2) of the Statute of the ICJ.

of European Union law entails its withdrawal from the European Union, at least in theory.[39]

Nevertheless, certain elements of international law are compulsory for specified countries. The clearest cases of this are as follows: states that ratify a convention without accompanying opt-out clauses are to apply all of the provisions of that treaty within their territories,[40] and countries which have joined an international institution are required to apply within their domains the compulsory agreements over which this entity has supervision.[41] Thus, international law is sometimes, but is not necessarily, sovereign in any particular part of the legal structure to which each country adheres.

Soft law and compliance

'Soft law' describes a set of prescriptive rules that do not in themselves have legal effect, but which influence those which do. An example of this in international law is a guide, such as the Guide to International Master Franchise Arrangements, which is published by the International Institute for the Unification of Private Law (UNIDROIT).[42]

In international financial law, soft law is the main way of publishing rules that the community wishes to be applied. There are several standard-setting organisations over this area, which include, for instance, the Financial Stability Board (FSB), the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking

[39] Individual Member States may have agreed with the institutions and other Member States of the European Union to be able to 'opt out' of specified parts of European Union legislation. For example, the United Kingdom is not required to enact and implement the European Union laws that concern the Economic and Monetary Union. Thus, the 'comply or withdraw' position that the European Union's institutions hold over its Member States in respect of the law is not absolute.

[40] This does not necessarily mean that the relevant convention applies to individuals within states that have ratified it. The general provisions of the specific international instrument describe its sphere of application. For instance, Chapter 1 of the United Nations Convention on Contract for the International Sale of Goods (1980) contains the provisions that determine this treaty's sphere of application.

[41] For instance, the Members of the ILO are required to apply in their territories the ILO Conventions – although Article 19(e) of the Constitution of the ILO falls short of forcing a Member to enact and implement a Convention to which its legislative authority does not consent.

[42] UNIDROIT, Guide to International Master Franchise Arrangements, second edition (Rome: UNIDROIT, 2007).

Supervision (BCBS) and the International Accounting Standards Board (IASB). As these entities tend to have a good number of members, especially amongst economically advanced countries, they expect the rules that they publish to carry through into national legislation, at least in spirit. A clear example of this is the enactment of legislation in respect of the Basel Framework for capital and liquidity requirements, pursuant to the documents that the BCBS has published. An inspection of the most recent progress report[43] shows that 18 of the 19 jurisdictions contained therein[44] have fully enacted the Basel II Framework, that 16 of these states have wholly adopted the enhancements to this Framework known as Basel 2.5, and that 2, 7, 7 and 3 jurisdictions have fully adopted all, 3, 2 and 1 of the 4 aspects of the Basel III Framework that the report highlights, respectively.[45] Given that Basel II, Basel 2.5 and Basel III were published in 2004, 2009 and 2010, respectively, with additions to Basel III after 2010, the progress report shows a first-rate adoption record for these detailed provisions of international soft law. The enactment of measures pursuant to the Basel Framework does not ensure that banks within the 19 jurisdictions will continuously implement the legislative measures, i.e. compliance within the jurisdictions is a step further than adoption. Nevertheless, it demonstrates beyond reasonable doubt that soft law instruments can be effective at the global level.

[43] BCBS, Eighth progress report on adoption of the Basel regulatory framework, April 2015 (Basel: Bank for International Settlements, 2015).

[44] These 19 jurisdictions are the European Union as a whole, Argentina, Australia, Brazil, Canada, China, Hong Kong, India, Indonesia, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, Singapore, South Africa, Switzerland, Turkey and the United States of America. The report also includes separate Basel Framework enactment information for the following European Union Member States: Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom (BCBS, Eighth progress report on Basel adoption, 4-20).

[45] BCBS, Eighth progress report on Basel adoption, 4-15. The 4 aspects are i) the risk-based capital requirements, ii) the liquidity coverage ratio, iii) the leverage ratio framework and disclosure requirements, and iv) the additional requirements for global systemically important banks (G-SIBs) and for domestic systemically important banks (D-SIBs). The status of adoption of the net stable funding ratio commences in the next progress report. Switzerland and Hong Kong are the 2 jurisdictions who have fully adopted all the 4 reported aspects of the Basel III Framework (BCBS, Eighth progress report on Basel adoption, 2-4).

To what extent is international law proactive?

A criticism that may be made of the subject is that it is responsive to circumstances, rather than preventative of cross-border legal or social difficulties which might occur. For example, it could be argued that the creation of the United Nations, the IMF and the International Bank for Reconstruction and Development were a response to the Second World War, and, similarly, that the content of the Basel III Framework was a response to the global financial crisis (GFC) of 2007-2009.

However true or false these claims might be, the issue is part of the following wider question: is the presence and content of law in general a response to social circumstances? One clear example of the answer to this question being 'yes', is the introduction of the Efficient Markets Infrastructure Regulation[46] in response to the burgeoning of trade in over-the-counter financial derivatives. Similarly, the pending introduction of a Regulation on shadow banking[47] is a response to the imbalance of the regulatory burden between traditional banking and securities transactions and those of the shadow banking sector.[48]

Nevertheless, it would be incorrect to suggest that law is always responsive to circumstances. For instance, the comments by Lord Hoffmann in *Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc and others*[49] and in *In re HIH Casualty and General Insurance Ltd*[50] were based on the belief of equitable distribution of assets in an international insolvency case, even though the Supreme Court later retracted from this position.[51]

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[46] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

[47] The European Commission's preparatory document is entitled 'Proposal for a Regulation of the European Parliament and of the Council on reporting and transparency of securities financing transactions', with reference: COM(2014) 40 final.

[48] The recent press release states: "The proposed regulation aims to increase the transparency of certain transactions in the shadow banking sector to avoid that banks circumvent other rules by moving those activities to the shadow banking sector." ("Commission welcomes agreement on improving transparency of certain financial transactions in the shadow banking sector", European Commission, accessed September 24, 2015, http://europa.eu/rapid/press-release_IP-15-5210_en.htm?locale=en.)

[49] [2006] UKPC 26; [2007] 1 AC 508.

[50] [2008] UKHL 21, [2008] 1 WLR 852.

[51] See the judgment of Lord Collins in *Rubin and another v. Eurofinance SA and others*, [2012] UKSC 46, although the dissenting judgment of Lord Clarke in this

It is submitted that law tends to be reactive by its nature, as the rules are put in place in order to regulate observed behaviour. Rules of international law are part of this system – their existence and content depends upon the observed behaviour of states and of persons in different jurisdictions. For a valid legal provision to be proactively brought into effect, it is necessary to accurately predict future behaviour – whether of persons, of natural phenomena, or of the results of the consequences of former human or environmental actions. In most cases, this would be difficult to do accurately. As with weather forecasting, it is much clearer what might happen the following day than during next year, decade or century. But laws take months, years or decades to adopt, especially at international level. For example the United Nations Convention on Contracts for the International Sale of Goods (CISG) was proposed in 1969, signed in 1980 and ratified in 1988. Its success is acclaimed widely today. Thus, the shortage of proactivity in international law should not cause undue concern.

Is international law a product of national law?

Parties to international agreements come from countries with different legal traditions. One might expect these to influence the content of cross-border rules.

The provisions of national law, and the tradition on which that law is based, may affect the content of international conventions. For example, paragraph 1 of Article 8 of the CISG is as follows.

> For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what the intent was.

This approach is one of subjective intent, which is in line with that in countries of civil law tradition. By contrast, paragraph 2 of Article 8 of the CISG expresses an objective intent approach, as follows.

> If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that

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case left the door ajar for the progression of Lord Hoffmann's view. The principled approach of Lord Hoffmann together with the legal rebuke by Lord Collins in the later case echoes aspects of the views and counter-opinions of Professors Herbert Hart, Ronald Dworkin and Neil MacCormick in their jurisprudential writings, in particular those surrounding the issue of the extent to which judges make new law.