

Foreword

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International law is a dynamic and enigmatic beast. While seemingly limited in scope to law regulating the community of nations, it is in fact a composite of the law of all those nations. It sneaks into our purview in the form of seemingly innocuous domestic disputes and at the same time through all-too-public international debates on the floor of the United Nations. Daily newspaper reports might indicate that international law is merely the stuff of Security Council Resolutions and Free Trade Agreements, but this public perception barely scratches the surface; it is a manifestation of centuries of legal development that has infused every aspect of our lives and culture.

Over two centuries ago Sir William Blackstone wrote:

The law of nations is a system of rules described by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that course which must frequently occur between two or more independent states and the individuals belonging to each.¹

While the public conception of international law may have drifted away from Blackstone's characterization, it has remained a product of the various independent nation states. Over the past two hundred years, through the rise of positivism and individual responsibility under international law, it has endured that international law is conceived of and created by the sovereign nations that comprise the

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1. W. Blackstone, 4 *Commentaries on the Laws of England* 66 (1st ed. 1765-1769).

international community.

In the course of the *Trail Smelter* arbitration, regarding transborder pollution from Canada, in 1937, the Legal Advisor to the U.S. Department of State wrote: "It is a fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source."² This understanding of sovereignty and the independence of states to act with impunity within its own borders has continued to influence and direct the course of international law.

States may object to the implementation of internationally recognized norms on the basis that, as an independent nation, they need not bend to the will of any other nation or organization, but the mere coexistence of States and geographic realities require some heed be paid to the laws of other nations and to general principles recognized by the international community. This concept is not new. In the 19th century, de Martens wrote that neighborly relations dictate international obligations and servitudes which necessarily impinge on any nation's right to act or to refuse to act.³

Many scholars have observed that the concept of sovereignty is in decline; that states are continually and systematically giving up their sovereignty in favor of a more comprehensive and stringent body of rights and obligations under international law. It has been argued that accession to multi-national organizations and agreements has steadily eroded the concept of the sovereign nation in favor of a global community.⁴ But equally persuasive is that this apparent relinquishment of rights is in fact an *exercise of sovereignty*.

Nations have not in fact given up their independence, but rather have recognized the existence of general principles of law so important to the people of their nation and their relations with other nations, that the most effective means with which to achieve these universal goals is as a global unit rather than independently. In his annual speech to the U.N. General Assembly in 1999, Kofi Annan stated:

State-sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation.

2. Memorandum in relation to the Arbitration of the *Trail Smelter* case, United States and Canada, 10 Aug. 1937, prepared by Green H. Hackworth, Legal Adviser, for Swagar Sherley, Agent of the United States *cited in* STEPHEN C. McCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* (2001).

3. *See generally*, F. de Martens, *Traite de Droit International* (1883).

4. *See* Richard B. Lillich, *Sovereignty and Humanity: Can They Converge?*, in *THE SPIRIT OF UPPSALA* 406 (Grahl-Madsen & Toman, eds., 1984).

The State is now widely understood to be the servant of its people, and not vice-versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.

Countries seem continually willing to forego their claims of independence and individuality in order to become part of the whole through accession to the will of organizations such as the United Nations and the World Trade Organization. By way of multilateral agreement, the global community has taken great strides in effecting the implementation of individual rights. By accepting the Charter of the United Nations, each country has voluntarily agreed to further the goals stated therein, to work as a unit for the benefit not only of each independent state, but for the citizens of those states. The changing conception of sovereignty has given rise to new sources of accountability and enforcement of generally agreed upon principles and international obligations.

The International Court of Justice, the newly active International Criminal Court, and the various international *ad hoc* tribunals have become a potent force in the global community. They are the result of a significant shift in the tenets of international law. No longer are states simply able to act without consideration of the obligations they have undertaken, but are subject to scrutiny and answerability. These tribunals are not solely intended to protect the States, but are evidence of the expansion of international law to encompass the individual. The people of the world now have centralized protection of their rights and the leaders of nations are no longer able to dismiss the needs and rights of their citizens.

While some international agreements were intended to be, and still remain, rather idealistic and aspirational⁶ others call for specific action by the various parties to implement and effectuate the aspirational and make it a reality.⁷ These obligations undertaken by the various nations are put into force through domestic law and regulation, thereby bringing the law of any particular state within the realm of international law.

5. U.N. Secretary-General Kofi Annan; *Annual Speech to the U.N. General Assembly*, Sept. 20, 1999, U.N. Doc. SG/SM/7136, GA 9596 (Sept. 20, 1999).

6. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948).

7. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights & International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

The impact of domestic law is not only that it is, in many ways, an implementation of a more-widely recognized right, privilege, or obligation, but also that it influences the development and enhances the understanding of customary international law. Oscar Schacter wrote that the Doctrine of Sources establishes “verifiable conditions for ascertaining and validating legal prescriptions. The conditions are the observable manifestations of the ‘wills’ of States as revealed in the *process* by which norms are formed—namely treaty and State practice as law.”⁸ The process from which international law derives incorporates the practice and the sense of obligation held by the various states, not solely those which are signatories to a treaty or members of an organization. The domestic law of any state can be seen as evidence of a universal obligation or a universal right, and thus even the most benign ordinance may play role on the global stage.

Were the U.N. and the WTO to go the way of the Permanent Court of International Justice and the League of Nations, international law would endure. This is particularly true with constantly increasing globalization. As the world becomes smaller, business and government are forced to participate within the global structure. No longer is it possible for a nation to remain isolated and independent in all respects. Technology has assured that communicating across the globe is as easy as down the street. It is impossible to ignore what other states are doing, and thus arises a sense of obligation to our fellow humans regardless of location. The world has become so easily accessible that the plight of any group or nation is within the grasp of all others. It is toward this end that international law has gained and will continue to accrue importance.

While not always succeeding, nations have consistently worked to further the best interests of themselves and their citizens; it was not with the establishment of the United Nations that people were given rights. Charles de Visscher wrote: “The inductive reasoning that establishes the existence of custom is a tied reasoning: the matter is not only one of counting the observed regularities, but of weighing them in terms of social ends deemed desirable.”⁹ It is with this in mind that I present Volume 5 of the *San Diego International Law Journal*.

In the following pages you will read a variety of pieces that span both the globe and the conceptual spectrum. Not only does this Volume explore the importance and effectiveness of international agreements and bodies, but also the laws of various nations that give rise to the gargantuan concept of international law. This Volume explores the

8. OSCAR SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 35 (1991).

9. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW*, 156-57 (Corbett trans. 1968).

impact of the laws of various states and the implementation thereof on foreign relations and the universal concepts of justice and freedom in their broadest terms. The rights of individuals are explored on equal footing with the rights and obligations of states. The obligations of the international community to help those for whom the most basic freedoms have yet to be achieved are discussed with an eye toward the betterment of us all.

This Volume comes on our fifth anniversary and as such, exhibits the growth and development, both of international law and of our work. It is our intention to serve not merely as a guide to the specifics of international law, but also, in a more sweeping sense, as a guide to the complexity of the global community and its diversity. The role of the international law scholar is not exclusively to provide commentary, but also to clarify and establish international law. Academic work has proven a driving force in international law and serves to effectively clarify what is otherwise a rather murky mess. The United States Supreme Court wrote in 1900:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, . . . resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly well acquainted with the subjects of which they treat. Such works are resorted to by tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.¹⁰

While the final determination of what constitutes international law is in the hands of judges, scholarship is a necessity in determining the breadth and application of any given principle. It is because there is no international legislative body, no established international police, and because the sources of law are so diverse and numerous, that work such as that found here is needed to effectuate the international rights and obligations as established in the global community. It is within the academic realm that one finds innovation and a catalyst to action.

International law is pervasive. It is not solely the realm of the U.N., but of each nation. Through examination of the minute aspects of the law as well as the more expansive concepts, this body of law can be extended and accurately applied so as best to fulfill the expectations of

10. *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299 (1900).

those nations which embody the international community and the citizens of those nations. International law has the potential to invade and influence, for better or worse, the life of every individual. We approach our task without limitation to the width or narrowness of any particular focus, but with recognition of the importance of these subjects to the ever-expanding sphere of international law.

I hope you will find the following pages filled not only with evidence of what the law is, but also what it ought to be.