The Making of International Law

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford ox2 6dp

Oxford University Press is a department of the University of Oxford.
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Published in the United States
by Oxford University Press Inc., New York

First published 2007

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
Biddles Ltd., King's Lynn

ISBN 978–0–19–924819–3
ISBN 978–0–19–921379–5 (Pbk.)

1 3 5 7 9 10 8 6 4 2

Series Editors' Preface

The importance of understanding how international law comes into being is too obvious to dwell upon. However, this subject is usually approached in a rather formalistic fashion, focusing on the 'sources' of international law as traditionally understood with various 'non-traditional' modes of norm generation added as something of an afterthought. Alan Boyle and Christine Chinkin approach the generation of international law from a wholly different perspective, focusing on the actors, systems, and processes by whom and through which international law is generated rather than upon the forms into which that law is categorised. This approach unites norm creation with the interpretation, application, and development of international law, resulting in a more subtle, but far richer, vision of the making of international law. As such, this volume exemplifies the ambition of the *Foundations of Public International Law* series, which seeks to offer insightful expositions of key elements of international law which will inform and stimulate debate. There is no doubt that this agenda-setting work will do both.

Malcolm D. Evans
Phoebe N. Okowa
October 2006

2004
Convention on State Immunity
SC Res 1540, 28 April
UNGA Res 59/25, 17 December

2005
Council of Europe Convention on Action against Trafficking in Human Beings
International Convention for the Suppression of Acts of Nuclear Terrorism
SC Res 1593, 31 March
Declaration on Human Cloning, UNGA Res 59/280, 8 March
World Summit Outcome, UNGA Res 60/1, 24 October

2006
UNGA Res 60/251, 3 April
International Convention for the Protection of All Persons from Enforced Disappearances, UN Doc A/HRC/1/L2, 23 June
United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/HRC/1/L10, 30 June

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International Law-Making

1. Introduction

This book is about the constitutive processes[1] of contemporary international law—how international law is made. It does not give an account of the traditional sources or theories of international law,[2] but identifies the processes, participants and instruments employed in the making of international law. It examines the 'mechanisms and procedures whereby new rules of law are created or old rules are amended or abrogated'.[3] It does not do this through a structured methodology[4] but offers an account of how international law-making responds to the demands of international relations at the beginning of the 21st century.

In 2004, in its Report on United Nations (UN) Reform,[5] the High Level Panel on Threats, Challenges and Change called for the development of international regimes and norms, and of new legal mechanisms where existing ones were deemed inadequate for responding to the threats to collective security that it had identified. In this introductory chapter we commence our discussion by examining the international law-making processes that have been engaged in response to one particular such threat: the incidence and gravity of terrorist atrocities. We do this to illustrate the range of law-making mechanisms and institutions that has evolved, to suggest some of their strengths and weaknesses, and to introduce some of the recurrent themes of the book.

Following the overview of international law-making in the context of terrorism, this introductory chapter considers the impact of different theories of international law on law-making, for in some respects identification of law-making processes depends upon how one defines international law. It then considers some particular issues of law-making in the contemporary globalised world. Finally it

[1] H. Lasswell and M. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven, 1992), especially 1131–54.

[2] There are numerous works on the sources of international law; see I. Brownlie, *Principles of Public International Law* (6th edn, Oxford, 2003) 3–29 and sources cited there.

[3] A. Cassese and J. Weiler, *Change and Stability in International Law-Making* (Berlin, 1988) 38.

[4] M. Bos, *A Methodology of International Law* (North Holland, 1984).

[5] *A More Secure World: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges and Change, UN Doc A/59/565, 2 December 2004.

Weeramantry considered that 'public conscience dictates the non-use of nuclear weapons'.[60] However the Secretary-General in his Report prior to the setting up of the International Criminal Tribunal for the Former Yugoslavia (ICTY) for the prosecution of war crimes and crimes against humanity committed at the break-up of the Former Yugoslavia did not draw upon moral or natural law but emphasised existing international customary and conventional law as essential for the prosecution of international crimes.[61] He thus affirmed a classic positivist approach for this innovative Tribunal.[62]

The legal positivist,[63] seeking rules deriving from state consent will tend to adhere to recognisable sources of authority, treaties and custom, and will give weight to those other sources identified in the Statute of the ICJ, Article 38 (1). The positivist is less willing to accept the normative effect of non-legal instruments such as GA resolutions or the final documents of global summit meetings, seeing any concept of so-called soft law[64] as seeking 'unprecedented expansion of the concept of law into areas of normative regulation which have never been considered as belonging to the law proper'.[65] While 'enlightened'[66] positivism retains the centrality of formal sources as the core of international legal discourse, it is more flexible, recognises change in patterns of state behaviour and wider methods of determining state consent and evidence of that consent. Further '[s]o-called soft law is an important device for the attribution of meaning to rules and for the perception of legal change'.[67] Perhaps strangely in that the classic exposition of sources of international law excludes any law-making role for non-state actors, among the strongest adherents to positivist law are civil society groups who seek the conclusion of treaties between states in as strong language as possible and to have input into those processes.[68] Civil society activists often have a faith in and commitment to the promise of international law whose law-making processes they seek to access.

The adherent to the New Haven (Yale) policy science approach to international law focuses not on rules but explicitly on the processes by which legal decisions and policies are made.[69] The *method* of analysis involves first identification of the

[60] *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226, 487, diss op Judge Weeramantry.

[61] Report of the S-G Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), para 34.

[62] A major criticism of both Nuremberg and the International Military Tribunal for the Far East was that it applied *ex post facto* law; I. Bantekas and S. Nash, *International Criminal Law* (2nd edn, London, 2003) 333–5. The S-G's approach echoes the assertion of the ICJ that it could 'take account of moral principles only in so far as these are given a sufficient expression in legal form'. *SW Africa Case* (1966) ICJ Reports 6, para 49.

[63] '"Positivism" is a label for a whole array of differing approaches to international legal theory.' B. Simma and A. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *AJIL* (1999) 302, 303.

[64] See Chapter 5.

[65] G. Danilenko, *Law-Making in the International Community* (Dordrecht, 1993) 20.

[66] B. Simma and A. Paulus, '"The International Community": Facing the Challenge of Globalization', 9 *EJIL* (1998) 266, 307.

[67] Ibid 308.

[68] See Chapter 2.

[69] For a concise account of the New Haven approach see M. Reisman, 'The View from the New Haven School of International Law', *ASIL Proceedings* (1992) 118. For emphasis on the communicative

observer's standpoint to allow disengagement and objectivity, second consciousness of the conceptual categories used by the observer to analyse particular situations, and third an understanding of the processes used to influence particular outcomes. The constitutive process therefore requires identification of trends in decision-making with reliance on past decisions in the light of their contexts (conditioning factors) and the desired outcome, thereby incorporating policy objectives and values. Unlike the positivist view, under the New Haven approach the decision-making process that generates international law is not limited to states or the actions of state officials. Instead it looks to:

> the aggregate actual decision process, comprised, as it is, of governments, inter-governmental organizations, non-governmental organizations and, in no small measure, the media. All the actors, who assess, retrospectively or prospectively, the lawfulness of international actions and whose consequent reactions shape the flow of events, now constitute, in sum, the international legal decision process.[70]

For the New Haven school the over-riding and determinative value is the promotion of human dignity. While this is presented as an objective standard and the process as scientific, in reality in a world of deeply held diverse ideologies, religious beliefs and cultural practices, such values are inevitably subjective. Too often, by adopting this approach the Yale School has been found to favour law that is in accordance with US policy-making.[71]

Other scholars have urged that greater attention be given to the institutions established by states. Wilfred Jenks argued that international law discharges its community functions through 'a complex of international and regional institutions . . . calling for uniform regulation on an international basis'.[72] Other theorists also focus on process, including institutional process. Prescribed procedures and processes restrain policy-based decisions (one of the criticisms directed at the New Haven school) and when institutions act according to those procedures their decisions develop new legal standards. These institutions 'clarify ambiguities in the law, fill gaps, and thus make law beyond the consent of states'.[73] Institutional practice changes state behaviour and thus contributes to emergent customary international law.[74] Seeking to understand the ways in which global institutions act as regulators as well as standard setters and the shift to extra-state institutional

function see M. Reisman, 'International Lawmaking: A Process of Communication', *Proceedings of the 75th Anniversary Convocation of the American Society of International Law* (1981) 101.

[70] M. Reisman, 'Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *EJIL* (2000) 3, 13.

[71] J. Hathaway, 'Avoiceia. Defender of Democratic Legitimacy?', 11 *EJIL* (2000) 121.

[72] W. Jenks, *The Common Law of Mankind* (New York, 1958).

[73] M. E. O'Connell, 'New International Legal Process', 93 *AJIL* (1999) 334, 349.

[74] For a discussion of the operational processes of the World Bank see B. Kingsbury, 'Operational Processes of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples', in G. Goodwin-Gill and S. Talmon (eds), *The Reality of International Law* (Oxford, 1999) 323.

(*lex specialis*) that is governed by a set of principles and rules which either excludes general international law or modifies it to accommodate the needs of the particular regime. The purpose of a self-contained regime is to regulate behaviour within the particular sector and to that end it can be developed to give effect to its relevant needs, priorities and agendas. Special regimes co-exist and their provisions may overlap or conflict. The ICJ has elucidated that the relevant *lex specialis* should be used to interpret or define the terms of another applicable regime. In the *Nuclear Weapons* advisory opinion the Court considered the application of human rights law (the right to life) in determining the legality of nuclear weapons. It asserted that:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[151]

This statement does not however resolve the question as to which regime provides the primary applicable law, or the extent to which one legal regime is applicable within a different legal regime, for example whether the WTO panels and Appellate Body are required to take account of human rights or environmental law. We return to this question in Chapter 5.

The relevant question for our purposes is whether we can speak of a generalised system of international law-making or whether certain methodologies and processes apply exclusively to specific issue areas. Evidently there are specialised institutions that have developed their own procedures and there is a growing number of courts and tribunals of limited jurisdiction.[152] Certainly contemporary international law is made and operates through special regimes within a framework of generally applicable principles. As evidenced by the *Mox Plant* arbitration, there is the potential for jurisdictional and substantive conflict which may increase with time. Nevertheless we consider that the conclusions of Charney's study of multiple tribunals remain valid: 'Although differences exist, these tribunals are clearly engaged in the same dialectic. The fundamentals of general international law remain the same regardless of which tribunal is deciding the issue.'[153]

5. Legitimacy

5.1 Process Legitimacy

A recurring theme throughout the book is that of legitimacy—the normative belief that a rule or institution ought to be obeyed. The expansion of international law-making processes, and consequentially the corpus of international law, reflects a

[151] *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226, paras 25–5.
[152] See Chapter 6.
[153] J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *Recueil des Cours* (1998) 101, 347.

belief in the international rule of law and that an international system subject to law benefits all international actors, the strong as well as the weak. The concept of legitimacy is used to enhance the moral persuasiveness of international law by importing other values such as those of justice or equity, and conversely the centrality of international law is undermined by assertions of its illegitimacy, either of the system as a whole or, more frequently, of particular rules. Franck has explained that one facet of the latter—rule legitimacy—is that a rule derives 'from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process'.[154] Hurd has similarly noted that an 'actor's perception [of legitimacy] may come from the substance of the rule or from the procedure or source by which it was constituted'.[155] Franck further argues that legitimacy is a significant factor in the 'compliance pull',[156] that a law-making process perceived to be illegitimate is likely to be disregarded and undermined. We accordingly use legitimacy as one criterion for assessing the different law-making processes discussed throughout the book.

Process is an essential element of law-making. It provides limits to arbitrary power. As Koskenniemi has asserted: 'formalism constitutes a horizon of universality, embedded in a *culture* of restraint, a *commitment* to listening to others' claims and seeking to take them into account'.[157] In a decentralised system no process can claim priority and different processes may be engaged simultaneously or in competition with each other. There are no easy pointers to the most appropriate way of approaching law-making in a specific instance, or as to which process will more likely be regarded as legitimate and by whom. Although for some critics of international law legitimacy is little more than a tool with which to reassert the sovereignty of states in an increasingly globalised world, for most governments the consensual basis of general international law through international agreements and decisions taken thereunder legitimises consequential restraints on sovereignty. In that sense legitimacy both derives from state consent, and is an essential pre-condition if governments are to be persuaded to give their consent to regulatory regimes. Accordingly where law is made through a long-established process that gives effect to state consent there is less likelihood of its being deemed illegitimate, while the legitimacy of new or adapted law-making processes may be challenged, especially where in one way or another they by-pass expressly given state consent.

Apparent distancing from well-established rules of international law can also lead to claims of illegitimacy. For example the assertion of jurisdiction based on the nationality of an alleged perpetrator even if that person's state is not a party to the Rome Statute is one challenge to the legitimacy of the ICC. The Sierra Leone

[154] T. Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705, 706; id. *The Power of Legitimacy Among Nations* (New York, 1990).
[155] I. Hurd, 'Legitimacy and Authority in International Politics', 53 *Int Org* (1999) 379, 381.
[156] On compliance see A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass, 1998); D. Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford, 2000); B. Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Mich JIL* (1998) 345.
[157] Koskenniemi, 65 *MLR* (2002) 159, 174.

Special Tribunal was established by treaty between the UN and the Sierra Leone government. International pressure from some governments and human rights organisations urged the arrest and return for trial of former Liberian President Charles Taylor from Nigeria. The Nigerian response was that it would only accede to a request from a democratically elected Liberian government. Implicit in this response is that such a request would be deemed legitimate, unlike one from a Tribunal established by a treaty to which Nigeria is not a party.

The direct impact of international law upon individuals and organisations means that it is not just states that are concerned about the legitimacy of international law-making. Again there are differing views. For example the assertion of individual criminal responsibility for the commission of international crimes has led to assertions by accused persons that the establishment of international war crimes tribunals by the SC is illegal because that body lacks the requisite competence[158] and that proceedings before these bodies are illegitimate.[159] On the other hand human rights NGOs herald the legitimacy incurred through individual criminal responsibility pronounced by international tribunals.

Charges of illegitimacy may also be made because of procedural irregularity, changed procedural rules that had not been widely accepted, the application of what are seen as double standards, or participation by actors deemed unacceptable. We discuss in Chapter 2 US claims that the Landmines Convention was negotiated through the wrong institutional fora and that the Chair of the Rome Conference gave inadequate time for consideration of the final text of the ICC Statute before its adoption. In the *Reservations* case the difficulty of applying the compatibility rule espoused by the majority was a further concern for the dissenting judges. Although they did not express it in terms of legitimacy, their opinion that a new rule 'should be easy to apply and calculated to produce final and consistent results'[160] covers similar ground. The legitimacy of an unworkable rule is not easy to uphold.

As is also discussed in Chapter 2 non-state actors seek to influence international law-making in a variety of ways. Their participation may be perceived either as unacceptable and as depriving a process of legitimacy or as redressing the democratic deficit of international processes.[161] In the *Nuclear Weapons Advisory Opinion* Judge Oda complained that:

> Some NGOs seem to have tried to compensate for the vainness of their efforts by attempting to get the principal judicial organ of the United Nations to determine the absolute illegality of nuclear weapons, in a bid to persuade the member States of the United Nations to press for their immediate and complete prohibition in the political forum.

[158] The Appellate Chamber of the ICTY asserted the legality of its establishment in *Prosecutor v. Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 40.

[159] A challenge that the ICTY failed to comply with the fair trial requirements of the European Convention on Human Rights, Article 6 (including impartiality and independence) failed in *Naletilic v. Croatia* (Application No. 51891/99), 121 *ILR* (2002) 209.

[160] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) ICJ Reports 15, 44; diss op Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo.

[161] See Chapter 2.

Judge Oda continued that this pressure meant 'that the Request [for an advisory opinion] did not reflect a meaningful consensus of the member States of the United Nations or even of its Non-Aligned Members' and that the Request was therefore not legitimate. But to other judges this broad expression of popular concern enhanced the importance and legitimacy of the Request. Judge Weeramantry noted that 'A multitude of organizations, . . . have also sent communications to the Court . . . and nearly two million signatures have been actually received by the Court from various organizations and individuals from around 25 countries'. These submissions 'evidence a groundswell of global public opinion which is not without legal relevance'.[162] These differences of opinion demonstrate both the subjectivity of any evaluation of legitimacy and the ready blending of assessments of both legality and legitimacy.

Franck has suggested four indicators of legitimacy: determinacy, symbolic validation, coherence and adherence to a normative hierarchy.[163] Current standards of good governance as promoted by the World Bank may offer other objective criteria as guidance to process legitimacy, for example the requirements of procedural transparency, democratic decision-making,[164] reasoned decisions and review mechanisms. The legitimacy of an international law-making process may be found in domestic systems. For example Slaughter has argued that the legitimacy of international law-making through government networks[165] is based upon the checks and balances that surround democratic governmental structures.[166] But one of the concerns about government networks is precisely that they have no formal constitutional status and thus lack domestic safeguards. It is evident that criteria of legitimacy are not easy to apply in particular cases and there may be debate about the conclusion in particular instances.

We have two final comments on this point. First, illegitimacy must be distinguished from illegality. If a body fails to observe its procedural rules it will have acted illegally and any outcome may lack legal force.[167] Second we reject the concept of legitimacy as a substitute for legality where the designated and accepted procedures have not been followed, or where substantive laws have been breached. Some commentators have concluded that unauthorised uses of force may be illegal but legitimate, for example because they are supported by humanitarian objectives.[168] Similarly in the context of the war on terror there is debate about whether torture may be legitimate, such as in the so-called 'ticking bomb' scenario. In the

[162] *Threat or Use of Nuclear Weapons* 1996 ICJ Reports 226, 438. Diss op Judge Weeramantry.

[163] Franck, 82 *AJIL* (1988) 705, 712.

[164] See Chapter 2 for discussion of whether non-state actor participation in international law-making democratises the process.

[165] See Chapter 2.

[166] A.-M. Slaughter, *A New World Order* (Princeton, 2004).

[167] The effects of illegality in international law are contested. E. Lauterpacht, 'The Legal Effect of Illegal Organisations', in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London, 1965) 88.

[168] eg military action by NATO with respect to Kosovo, 1999. See generally E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Leiden, 2006).

absence of changed law such action must remain illegal although legitimacy is an important measure for assessing evolving international law-making processes.

5.2 System Legitimacy

Behind many of the discussions about contemporary international law-making and legitimacy lie the role and actions of the world's sole superpower, the US. The US has had an equivocal stance with respect to international law-making. On the one hand it has been a key player in shaping the contemporary legal order, including playing a central role in the creation of the UN, the International Financial Institutions, human rights instruments and other multilateral regimes. There has always been a US judge on the World Court and a US member on the ILC. On the other hand it has failed to become a party to core multilateral instruments, or has delayed for a long period before doing so. At the outset of the 21st century there are concerns that by resorting to unilateralism and rejecting the multilateralism of contemporary international law-making the US is weakening the legitimacy of the international system as a whole. Claims of American exceptionalism, its unique constitutional order and of its global responsibilities are raised to justify this stance. These are considered below and some of the law-making dilemmas created by its stance are discussed in the relevant places throughout the book.

As a starting point, 'theorizing international legitimacy var[ies] across countries, regions and political traditions'.[169] This is relevant to the reality that the most powerful states have long played a particular role in the making of international law.[170] The actions of the most powerful states in the international legal system have traditionally carried greater weight in the formation of customary international law. As remarked by De Visscher, 'Every international custom is the work of power'.[171] Schachter also noted that it is 'a historical fact, [that] the great body of customary international law was made by remarkably few States'.[172] International law rules such as those relating to acquisition of territory, diplomatic protection of aliens, or compensation for alienation of foreign investment were formulated by a small number of powerful states to uphold their interests. Unequal status was discounted in international law. Capitulatory regimes were imposed upon weaker states by European powers; economic coercion was excluded from the body of the Vienna Convention of the Law of Treaties and located in an Annex, and there is no generalised doctrine of unequal treaties

[169] B. Kingsbury, 'The International Legal Order', in P. Cane and M. Tushnet, *The Oxford Handbook of Legal Studies* (Oxford, 2003) 272, 284.

[170] G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, 2004).

[171] C. De Visscher, *Theory and Reality in Public International Law* (2nd edn, P. Corbett trans, Princeton, 1968) 154.

[172] O. Schachter, 'New Custom: Power, *Opinio juris* and Contrary Practice', in J. Makarczyk, *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague, 1996) 531, 536.

within that Convention. Actions of the powerful were legitimated by the concept of the civilising mission. Resistance was discounted since the doctrine of protest and lack of acquiescence was not applied to relieve the burden of the rules for those who had been made subject to them.[173] The non-democratic nature of the customary international law process undermines its legitimacy and it is rendered illegitimate to those who have been adversely subjugated by it. Indeed the 'rational, ruthlessly [legally] ordered world of sovereign states had no place for those portrayed as unruly, disordered, subversive, primitive, or irrational'.[174] To such outsiders—those who are marginalised 'from full citizenship in Western democracies . . . such as women, indigenous peoples, the mentally ill or refugees', international law may hold little legitimacy.

There has been some change in both customary international law and treaty-making processes. The contrary practice of a large number of states may outweigh that of a smaller number of more powerful states,[175] destabilise an accepted rule of customary international law and in time replace it. For example challenges to a three mile territorial sea and claims to broader preferential fishing zones, or more generally economic zones, were made by states such as Iceland and the maritime states of South America and were at first rejected by more powerful states. In time such states accepted the emergence of new customary law and have made their own claims.

Nevertheless the practice of the most dominant states tends to retain a particular force in claims of emerging customary law and the ICJ has affirmed that the practice of states 'whose interests are specially affected' is an 'indispensable requirement' to the process.[176] But this leaves open the identity of a 'specially affected' state. There remains an assumption that it is the most dominant state.[177] As Danilenko explained:

> . . . the notion of 'specially affected states' may be used as a respectable disguise for 'important' or 'powerful' states which are always supposed to be 'specially affected' by all or almost all political-legal developments within the international community.[178]

For example, it has been claimed that the military intervention in Kosovo in 1999 by NATO member states without explicit SC authorisation provides evidence of an emergent (or existing) rule of customary international law of humanitarian intervention. But must a 'specially affected state' be the one that provides military

[173] Rajagopal, *International Law from Below*.

[174] A. Orford, 'The Politics of Collective Security', *17 Mich JIL* (1996) 373, 400.

[175] For the view that the US is less influential in the making of customary international law than 'is often assumed' see S. Toope, 'Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law', in M. Byers and G. Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge, 2003) 287.

[176] *North Sea Continental Shelf Cases* (1969) ICJ Reports 3, para 74.

[177] M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge, 1999) chapter 3.

[178] G. Danilenko, *Law-Making in the International Community* (Dordrecht, 1993) 96.

basis for its 1993 military action in Iraq. Without any such supporting practice verbal claims lack weight[208] and the widespread resistance also weakens any arguments for pre-emptive self-defence attaining the status of customary international law.

Third, the US has *not* consistently rejected multilateral law-making and it normally supports initiatives where they accord with its interests. Its broad agenda, notably a commitment to neo-liberal economic policies, has been dominant in *inter alia* the WTO, the Organisation for Economic Cooperation and Development (OECD), the International Financial Institutions and the legal frameworks for post-conflict reconstruction in such places as Bosnia, Kosovo, Afghanistan and Iraq. Indeed 'many . . . areas of international law are generally characterised by a marked imbalance in favour of western influence, heightened by the relative paucity of expert scholars, practitioners, regulators, and leading corporations based outside the OECD'.[209] In pursuing its agenda through international law it has strengthened the requisite institutions. For example there has been much discussion of the harm to the authority of the SC caused by the unauthorised military action against Iraq in 2003. Rather less notice has been taken of the strengthening of the SC, for example in the establishment of the Counter-Terrorism Committee, with its far-reaching mandate and intrusion into national legal systems.

The US has also on some occasions used its diplomatic muscle effectively in securing adoption of law-making resolutions under Chapter VII that uphold its interests. The veto enables the US (or any other P5—the five permanent members of the Security Council—member) to prevent any substantive resolution it considers to be against its interests, while it can benefit from SC authority for actions where it can engender agreement. Of course, even the US cannot guarantee that it will always get its own way, even in the SC.

Fourth, although its counter-terrorist activities have seen assertions of the non-applicability of international law (for example the Geneva Conventions with respect to prisoners in Guantánamo Bay), the US has pursued law-making through other arenas such as the Convention on the Suppression of Acts of Nuclear Terrorism 2005, discussed above. Finally there is a genuine concern that certain principles of international law have become outmoded and require amendment and reform. This has been recognised by the High Level Panel on Threats, Challenges and Change, the Secretary-General and the 2005 GA Summit Outcome Document. All explicitly accept the need for some changes in the law in areas of concern to the US: intervention in cases of widespread, gross violations of human rights and further powers in the war against terror. But these documents stress the need for multilateral law-making through deliberation and negotiation,

[208] There has been much debate about the weight to be accorded to a state's words as opposed to its actual practice; eg A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY, 1971) and K. Wolfke, *Custom in Present International Law* (2nd rev edn, Dordrecht, 1993); M. Akehurst, 'Custom as a Source of International Law', 47 *BYBIL* (1974–5) 1.

[209] Kingsbury, in Cane and Tushnet, *The Oxford Handbook of Legal Studies*, 275.

not unilateral action. Nevertheless the fact that the US asked for a recorded vote and registered a negative vote[210] in relation to the GA resolution adopting the mandate of the newly established Human Rights Council[211] does nothing to abate concerns about the US unwillingness to accept legal change where it is unable to assert its will. This tension constitutes the contemporary backdrop to international law-making.

6. Reform of International Law-Making

The international legal system has moved far beyond the categorisation of the sources of international law in the Statute of the ICJ. Flexibility has been engendered as long-standing law-making processes have adapted to changed conditions and new processes have evolved. Some have been contentious and the nature of the adopted instruments disputed, for example the legal effect of GA resolutions. Adaptations include such techniques as opting into (or out of) treaty amendments that allow for technical changes, or extension to the scope of existing treaties without the need for formal processes such as diplomatic conferences. As we discuss in Chapter 5, new multilateral processes may become accepted as law-making. Initially non-binding outcomes may become binding through their acceptance as customary international law: any other way of bestowing legally binding status on any instrument other than a treaty would be a revolutionary change in the structure of the system, based as it is on the consent of states.[212] It is striking that while the High Level Panel on Threats, Challenges and Change urged law-making initiatives, it did not offer any new modalities of law-making. Its suggestions were for treaty-making through the GA and for institutional reform. The most significant change to date, establishment of the Human Rights Council as a subsidiary body of the GA, in place of the Commission on Human Rights, has been achieved through GA Resolution.[213]

A further question is: who determines an instrument to be law-making? It is no longer the case (if indeed it ever was) that such decisions are made by Heads of Governments or Ministers of Foreign Affairs. The ICJ has noted the increasing frequency with which other officials speak for their states on issues of foreign affairs, for example holders of technical ministerial portfolios within the area of their competence.[214] Such people may well have to determine whether they accept

[210] The voting was 170 in favour; four against; three abstentions.

[211] UNGA Res 60/251, 3 April 2006.

[212] O. Garibaldi, 'The Legal Status of General Assembly Resolutions: Some Conceptual Observations', 73 *ASIL Proceedings* (1979) 324, 325.

[213] UNGA Res 60/251, 3 April 2006. UN Charter, Article 22 authorises the UNGA to establish such subsidiary bodies as are necessary for performance of its functions. The UNGA also decided to establish a Peacebuilding Commission as an intergovernmental advisory body. UNGA Res 60/1, 24 October 2005, para 97.

[214] *Armed Activities on the Territory of the Congo (DRC v Rwanda)* (2006) ICJ Reports, para 47.

certain instruments as law-making and their responses thereto. National judges increasingly find themselves having to decide what constitutes international law. The growing impact of international law upon individuals means that such claims are likely to increase. When acted upon, national judicial decisions contribute to the development of international law that is applied throughout diverse arenas.[215] S.85

There have been constant proposals for changes to international law-making processes. Some have envisaged 'elaborate constitutional blueprints for global reform'[216] including such measures as staggered voting blocks in the GA, change in the composition of, and veto power in, the SC and hence to law-making with respect to collective security. However, proposed reforms of the existing institutional structure have been described as 'at best a very partial or incomplete form of democracy in international life' in that they remain rooted in a state-centred model of international affairs.[217] Other proposals have looked to giving greater prominence to the law-making role of non-state actors. This is not new. Writing about the sources of law in 1925 Sir Hersch Lauterpacht considered that:

> The definition of the sources of rules of international law as historical events to which their establishment can be traced, is, I think, correct; but there is no reason to restrict these historical events to those only which are evidenced by acts of statesmen or written documents; the legal conviction and the sense of right of masses of men [*sic*] is a historical fact of no less force.[218]

One such proposal is that activities of NGOs should be accepted as constitutive of practice for determining rules of customary international law, reflecting the contemporary dynamics of the formation of international law.[219] Participation by NGOs and other non-state actors in international law-making is discussed in Chapter 2 but we note here that such a proposal entails considerable theoretical and logistic difficulties. For example: which of the thousands of NGOs in existence would have this status? Which of their myriad and diverse activities could constitute 'practice'? Whose actions would constitute those of an NGO? Would this equate the international legal personality of NGOs with that of states, or of IGOs? And as we discuss in the following chapter, NGO agendas are not necessarily produced with greater democracy or transparency than the agendas of states or IGOs.

[215] See Chapter 2. [216] Friedmann, *Law in a Changing Society*, 478.

[217] D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge, 1995) 270.

[218] H. Lauterpacht, 'Westlake and Present Day International Law', 15 *Economica* (1925) 307, 318. See Chapter 2.

[219] I. Cunning, 'Modernizing Customary International Law: The Challenge of Human Rights', 31 *VJIL* (1991) 211. For a critique of these proposals see K. Knop, 'Re/statements: Feminism and State Sovereignty in International Law', 3 *Transnational Law and Contemporary Problems* (1993) 293, 311–15.

Other proposals are rooted in the assumption that the legitimacy of international law-making would be enhanced by according a greater role to civil society through institutional processes. In the words of Anderson and Rieff:

> . . . international NGOs have gradually taken a leading role in providing what is declared to be the legitimate, and politically legitimising, input of the world's peoples across a myriad of issues and causes. . . . International NGOs come together to advocate for the peoples of the world, those who would otherwise have no voice, given that the actors they seek to influence, which include both economic actors and the world's superpower, are globally unregulated.[220]

In response to what was considered to be the undemocratic character of the SC and the need to revitalise the GA, the 1995 Commission on Global Governance proposed an International Assembly of People and a Forum of Civil Society with direct access to the UN system.[221] In 2000 the UN Secretary-General proposed an NGO Millennium Forum held in conjunction with the Millennium Assembly.[222] Richard Falk and Andrew Strauss have argued for a standing Global Peoples Assembly, organised and represented by civil society. Their vision is for a 'globally democratic institutional structure that would enable the peoples of the world to have a meaningful and effective voice'.[223] Falk and Strauss consider that the transformative potential of such a supra-national law-making body would derive from the freeing of delegates from parochial nationalist or state interests,[224] enabling delegates to identify common purposes and solutions across other lines. In particular a standing global forum would allow the development of coherent policy and offer an alternative to the *ad hoc* nature of civil society access to, and participation in, institutional law-making described in Chapter 2. Clearly any such proposal raises major problems of logistics, organisation, representation and legitimacy.[225] It would require 'many and substantial changes to the way in which the world is governed'.[226] However there is no obvious reason why, given the requisite political will, the powers and status of a global parliamentary body could not be allowed to evolve over time, as has been the case with the European Parliament.[227]

[220] K. Anderson and D. Rieff, '"Global Civil Society": A Sceptical View', in H. Anheier, M. Glasius and M. Kaldor (eds), *Global Civil Society 2004/5* (London, 2005) 26, 28.

[221] *Our Global Neighbourhood: Report of the Commission on Global Governance* (Oxford, 1995) 259.

[222] UN Doc A/52/850, 31 March 1998.

[223] R. Falk and A. Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', 36 *Stan JIL* (2000) 191, 195 n. 16 (citing the Perugia Assembly of the United Nations of Peoples).

[224] Cf the vision of Alfred Lord Tennyson in *Locksley Hall* (1842):

> Till the war-drum throbb'd no longer, and the battle-flags were furl'd
> In the Parliament of man, the Federation of the world.
> There the common sense of most shall hold a fretful realm in awe,
> And the kindly earth shall slumber, lapt in universal law.

[225] See also the discussion of Peoples' Tribunals in Chapter 2.

[226] R. Buchanan, 'Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organisation', 16 *LJIL* (2003) 673, 695. [227] See Chapter 3.

We have some final questions. First how *should* international law be made? Since the early 1990s this question has had great practical application, for instance in the context of international criminal law. As the following chapters explain, many institutions and processes have been engaged in making international criminal law procedures and substance. International criminal procedures have been created in diverse ways: the ICTY and ICTR were established by SC resolution following a fact-finding commission and a feasibility study by the Secretary-General; the ICC through state treaty negotiation with broad NGO participation; and the Sierra Leone Special Tribunal through treaty negotiation between the UN and the Sierra Leone government pursuant to SC resolution 1315, 14 August 2000. The judges drafted the Rules of Procedure and Evidence of the ICTY and ICTR; states parties negotiated them for the ICC; the Statute for the Sierra Leone Special Tribunal provided that the Rules of Procedure of the ICTR apply, although the judges could amend them if needed, guided by Sierra Leone criminal procedure. Unlike the other international criminal courts, this body has both international judges and judges appointed by the local government and has jurisdiction over crimes under Sierra Leone law as well as international law. As with the discussion of law-making responses to global terrorism, these different procedures demonstrate the flexibility of contemporary law-making and responsiveness to political and legal situations on the ground. Similarly substantive international criminal law has been crafted by the ILC; the SC; the GA through espousal of general principles; states through sustained treaty negotiation and subsequently meetings of the ICC Assembly of States Parties; and by international and national judicial decision-making. But from where should each of these bodies derive the starting points for development of substantive law? From earlier international law treaties and jurisprudence, albeit often inadequate and providing only a skeletal framework? From domestic legal systems? From jurisprudence on analogous areas such as that of the regional human rights bodies? From the works of criminologists, political and social scientists? From the advocacy of civil society? Does the crafting of new legal principles from all these sources lack coherence? Or does it provide a broad legitimacy to a complex enterprise?

Second, the second half of the 20th century was characterised by a vast amount of new international law generated through diverse multilateral processes. Rules and principles of international law now formally constrain, empower, and structure state behaviour (and in some instances that of non-state actors) across numerous areas of political, social and economic life. But law-making is not the end of the story, only its beginning; questions of implementation, compliance, effectiveness and enforcement are self-evidently important. Moreover, having laws is not the same as having effective law, even when fully complied with. Full compliance with the Climate Change Convention will not save humanity from global warming, to take only one example. In the midst of widespread international legal regulation there also remain 'law-free zones'[228] or 'legal black holes'[229]—areas where states claim that there is no applicable international law against which their behaviour can be assessed. The refusal of some states to apply the Refugee Convention, 1951 to persons on the high seas before they can land and claim non-refoulement is a good example.[230] The collapsing of territorial boundaries through the internet has created other challenges—as yet unresolved—for international legal regulation.[231] We suggest that what is now needed is not still more international law-making but greater efforts at ensuring the integration, coherence, effectiveness and universal reach of existing international law.

Third, international law is a regulatory tool for pursuing such goals as orderly and equitable distribution of global assets, sustainable development and global social justice. It is also an instrument of control. Who determines the international law-making agenda and the allocation of resources to law-making are therefore crucial. As we discuss in Chapters 2 and 3, while states continue to dominate these issues, other actors are also influential. But it is also evident that the use of international law to promote a social justice agenda is limited: as noted earlier, the blueprint agreed to by all the world's countries and leading development institutions—the MDGs—is not the outcome of any law-making process and is not in binding legal form. Their language of identified and time-specific targets is that of political, not legal, commitment. International lawyers barely engage with them. Their implementation rests *inter alia* with economists and development agencies but not with lawyers, international or national. What is the impact of the acceptance of the MDGs on international law-making? Is the fact that legal processes were not engaged indicative of an unwillingness to incur legal responsibility for lack of performance, cynicism about the role or 'value-added' of international law, or recognition that agreement would have been unlikely to legally binding norms? Was there even a hope that their undermining of internationally accepted standards of human rights would pass unnoticed?

We do not have answers to these and other questions, but we do hope that the book will stimulate debate and show why it is important that international law-making must be evaluated alongside other political, social and economic institutional processes.

[228] The expression was used by Sherryn J. Aiken, Queens University, Ontario in a presentation, 'Immigration and Refugee Law', University of Toronto, 3 June 2006.
[229] J. Steyn, 'Guantánamo Bay: The Legal Black Hole', 53 *ICLQ* (2004) 1.
[230] See R. Barnes, 'Refugee Law at Sea', 53 *ICLQ* (2004) 47.
[231] F. Mayes, 'Europe and the Internet: The Old World and the New Medium', 11 *EJIL* (2000) 149.

Further Reading

A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2004).
M. Byers and G. Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge, 2003).
G. Danilenko, *Law-Making in the International Community* (Dordrecht, 1983).
T. Franck, *The Power of Legitimacy Among Nations* (New York, 1990).
International Law Association, *Report of the 69th Conference*, Committee on the Formation of Customary International Law (London, 2000).
M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2001).
D. Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford, 2000).
'Symposium: Method in International Law', 93 *AJIL* (1999) 291.

2

Participants in International Law-Making

1. Introduction

The traditional statement of the sources of international law, the Statute of the International Court of Justice (ICJ), Article 38 (1) assumes states to be the primary actors in international law-making and gives no indication of the ways in which non-state entities impact upon this function. Although states enter into binding agreements with non-state entities, treaties are defined as legal agreements between states,[1] or between states and international organisations or international organisations *inter se*;[2] state practice and *opinio juris* are the constitutive elements of customary international law; general principles of law are gleaned from the domestic legal systems of states. In the traditional schema of sources the contribution of non-state actors is recognised only with respect to the subsidiary sources: the writings of publicists. As President of the ICJ, Judge Higgins, has put it: 'States are, at this moment of history, still at the heart of the international legal system.'[3] But focus solely on state actions gives a misleading picture of international law-making. Account must also be taken of the role and influence in multilateral law-making of the state-based intergovernmental organisations (IGOs) that are discussed in the following chapter. The present chapter considers the place in international law-making of other non-state actors, in particular those that are variously termed civil society, transnational advocacy networks,[4] social movements,[5] and in an institutionalised form, non-governmental organisations (NGOs). In general terms, such non-state actors have sought access to international governmental institutions and law-making processes to advance their own agendas. Their role must be considered in order to understand some of the political influences behind international law-making and some of the ways in which alliance with civil society enhances the profile of some apparently weaker states within international law-making arenas and diffuses centralised state power.

[1] 1969 Vienna Convention on the Law of Treaties (VCLT), Article 2 (1) (a).
[2] 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, Article 2 (1) (a) (i) and (ii).
[3] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, 1993) 39.
[4] M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY, 1998) 9.
[5] R. Cohen and S. Rai, *Global Social Movements* (London, 2000).

regional human rights bodies) may be assisted by NGOs, or NGOs may appear in their own right.[201] Other non-state actors are given standing before international bodies, for example NAFTA Chapter 11, ICSID, Article 36 and the Statute of the International Tribunal for the Law of the Sea, Article 20. By initiating claims within the terms of these various treaties, non-state actors are able to ensure that international legal arguments have been presented in their terms and states forced to respond, rather than the other way round.

NGOs have also participated as third parties before international judicial bodies, for example through the submission of *amicus curiae* briefs or interventions. The proliferation of international courts described in Chapter 6 means that there are more judicial fora open to NGO participation. The ICJ has remained largely closed to NGOs,[202] but other courts have allowed NGOs to raise issues or arguments not presented by the parties,[203] for example the European[204] and American Human Rights Courts.[205] The indeterminate and imprecise language of human rights treaties has allowed innovative arguments that have led to far-reaching reconceptualisation of substantive provisions. For example *Velasquez Rodriguez v. Honduras*[206] is widely considered a landmark decision with respect to the recognition of disappearances as a human rights violation, state responsibility for omission, and for the assertion of a state's positive duty to exercise due diligence to respect and ensure the right to life. A cluster of NGOs—AI, the Association of the Bar of the City of New York, the Lawyers Committee for Human Rights and the Minnesota Lawyers International Human Rights Committee—all made submissions to the American Court of Human Rights. The extended understanding of state responsibility expounded by the American Court has been picked up and incorporated in other contexts as discussed in Chapter 6. This has been a reiterative and mutually reinforcing process between NGOs, adjudicative bodies,

[201] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, 1998, Article 5 (3) allows NGOs with observer status before the Commission to institute cases before it.

[202] On the ICJ and NGOs see C. Chinkin, *Third Parties in International Law* (Oxford, 1993) 226–37. There have been some inroads into the ICJ's advisory jurisdiction. ICJ Practice Direction XII, 2004, states that NGO submissions in an advisory opinion do not form part of the case file. They are however 'publications readily available' and may be used by states and IGOs in their statements. Statements and documents submitted by NGOs are placed in a designated location and states and IGOs making statements under the Statute of the ICJ, Article 66 will be so informed.

[203] On the importance of *amicus curiae* briefs before international courts and tribunals see C. Chinkin and R. Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"', in L. Boisson de Chazournes, C. Romano and R. Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Ardsley, 2002) 135, 136–9.

[204] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11, Article 36 (2). Sometimes the European Court refers extensively to an NGO intervention, eg *MC v. Bulgaria* (Application no. 39272/98), judgment of 4 December 2003 cited sections of a brief submitted by Interights.

[205] There is no provision in the American Convention on Human Rights permitting this but the Court has received NGO submissions from the outset; Chinkin, *Third Parties*, 242–4.

[206] *Velasquez Rodriguez v. Honduras* (1988) IACHR OAS/Ser.L/V/III.19, doc 13.

UN human rights treaty bodies, the GA and expert working groups. It has clarified the legal standard of state obligation and evolved new processes of accountability. In the particular context of the movement against violence against women, the first special rapporteur on violence against women has called it:

> Perhaps the greatest success story of international mobilization around a specific human rights issue, leading to the articulation of international norms and standards and the formulation of international programmes and policies.[207]

NGOs act as non-party advocates before other courts.[208] The *ad hoc* international criminal courts have had a particular law-making role in that they have had to mould a workable international criminal law primarily from the minimalist provisions in their Statutes and dated precedents from the World War II war crimes trials. When faced with novel issues of substance and procedure, they have on occasion sought assistance from NGOs and academics. For example in *Blaskic* the ICTY had to determine whether it could issue a *subpoena* to Croatia and Croatian officials. Judge Kirk McDonald made an order inviting requests for leave to submit *amicus* briefs on the power of the Tribunal to issue a *subpoena* to a sovereign state, to a high government official of a state and remedies for non-compliance with such a *subpoena*.[209] A range of individuals and NGO representatives responded and submitted *amicus* briefs on these issues.[210]

National courts are also relevant to international law-making.[211] NGOs such as AI have collected and collated evidence of human rights violations against the possibility of its use in legal proceedings.[212] NGOs commence or intervene in litigation involving issues of international law. Inevitably the regularity and success of this strategy depends upon whether national law allows for such processes and whether there is a culture of NGO legal activism. NGOs have been most active in

[207] R. Coomaraswamy, 'The Varied Contours of Violence against Women in South Asia', paper presented to Fifth South Asia Regional Ministerial Conference, Celebrating Beijing +10, Pakistan, May 2005, 2.

[208] On the controversy with respect to NGO submissions to the WTO Panels and Appellate Body that have not been requested, see Chinkin and Mackenzie, 'International Organizations' 135, 149–53.

[209] *Prosecutor v. Tihomir Blaskic*, (IT-95–14) Order Submitting the Matter to Trial Chamber II and Inviting *amicus curiae*, 14 March 1997.

[210] Judge Lal Chand Vohrah, 'Pre-trial Procedures and Practices', in G. K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law*, vol 1 (The Hague, 2000) 481, 526.

[211] Former President of the ICJ Jennings notes the importance of reporting of decisions of municipal courts that contain questions of international law; R. Jennings, 'The Judiciary, International and National and the Development of International Law', 45 *ICLQ* (1996) 1.

[212] This became public knowledge when a Spanish magistrate requested an arrest warrant against Former President of Chile Senator Pinochet during the latter's visit to London in October 1998. In the subsequent litigation AI, the Medical Foundation for the Care of Victims of Torture, the Redress Trust and the Association of the Relatives of the Disappeared Detainees intervened. AI was exceptionally given leave to make oral submissions and Human Rights Watch made a written submission; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 WLR 827.

this respect in the US. The Alien Torts Claims Act, 1789 has been used in numerous cases to bring the human rights violations of a range of actors, including military generals and corporations, before the courts. Summary proceedings in the absence of the defendant allow victims to present their claims, place their accounts on the record and secure a ruling from the bench. Bodies such as the Center for Constitutional Rights, Washington DC and the Center for Justice and Accountability, San Francisco (an anti-impunity organisation established by AI in 1998), assisted by human rights law clinics such as those at the Yale Law School and the City University of New York, have researched and presented arguments in a number of such cases. This litigation for transnational civil responsibility has been criticised as being so intertwined with the US judicial system that it appears a 'unilateralist imposition of US interests'.[213] Nevertheless it has allowed judicial statements as to the customary international law status of such crimes as the prohibition of torture[214] and rape as a war crime or an act of genocide[215] and in developing a non-coercive form of intervention in response to human rights abuses. This judicial activity has contributed to the international pressure for accountability for human rights abuses that has seen the establishment of the international criminal tribunals and growing state practice relating to the exercise of universal jurisdiction. However the activity of US courts in this regard may be lessened after the Supreme Court narrowed the scope of Alien Torts Claims litigation in *Sosa v. Alvarez-Machain*.[216]

In the particular context of individual criminal responsibility for international crimes NGOs have used international argument across a number of fronts: preparing for and intervening in national and international litigation; campaigning for the detention of alleged perpetrators and subsequently for the exercise of universal jurisdiction within national courts; campaigning first for the *ad hoc* international criminal tribunals and for an ICC; and adding to the subsequent commentary. It is perhaps significant that a decision upholding the immunity of a government official against allegations of crimes against humanity was made by the ICJ[217] where NGOs have been unable to secure participatory rights.

However use of national courts may be a somewhat high risk strategy: there is no guarantee that a national court will be receptive to NGO arguments of international law, or that the decision will support the hoped-for view. The assessment must be made that raising the profile of the particular issue is worthwhile even in the face of a disappointing decision. It must also be remembered that the decisions of national courts do not, of themselves, constitute customary international law and that national judges may (rightly) be cautious in pronouncing rules of international law. In *Jones v. Ministry of the Interior* the Redress Trust, AI, Interights and Justice

[213] B. Kingsbury, 'The International Legal Order', in P. Cane and M. Tushnet, *The Oxford Handbook of Legal Studies* (Oxford, 2003) 272, 278.

[214] *Filartiga v. Peña-Irala* 630 F 2d 876 (US CA, 2nd Circ).

[215] *Kadic v. Karadžić* 70 F 3d 232 (2nd Circ).

[216] 124 S Ct 2739, 29 June 2004. See B. Roth, 98 *AJIL* (2004) 798 for analysis of the case.

[217] *Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium)*, 2002 ICJ Reports 3 (Judgment of 14 February).

intervened in the House of Lords arguing for an exception to state immunity in cases of civil claims against torture. In rejecting such a rule of international law Lord Hoffmann stated:

> . . . the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.[218]

Whatever the outcome, national judicial decisions must not be given excessive weight as evidence of customary international law. Nevertheless a positive decision contributes to state practice[219] and thus to evolving or crystalising a rule of customary international law. Former ICJ President Judge Jennings has noted the view that domestic courts may contribute to the transformation of law-making treaties into customary international law through their application in non-party states.[220] National judicial decisions are subsidiary sources of international law under ICJ Statute, Article 38 (1) (d) and should be considered alongside other jurisprudence, as discussed in Chapter 6.

7.2 NGO Innovations

Where international procedures have not existed NGOs have sought their introduction. For example women's NGOs were to the forefront of an effective advocacy campaign for the adoption of an individual complaints mechanism for the Convention on the Elimination of All Forms of Discrimination against Women, 1979 and NGOs were active in seeking the establishment of an African Court of Human Rights. The former campaign was conducted through the Vienna[221] and Beijing[222] global summit meetings to gain support for the proposal. Practical steps were taken through the preparation of a draft text by NGO representatives and academics for presentation to the appropriate bodies—the Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women.[223] It reached fruition through the adoption by the GA of the Optional Protocol to CEDAW which provides for both individual complaints and an inquiry

[218] *Jones v. Ministry of the Interior* [2006] UKHL 26; [2006] 2 WLR 1424, para 63 per Lord Hoffmann.

[219] In the *Arrest Warrant Case* the ICJ stated that it had 'carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation'. *Arrest Warrant Case*, para 58.

[220] R. Jennings, 'The Judiciary, International and National and the Development of International Law', 45 *ICLQ* (1996) 1, 2 citing K. Zemanek, in *Festschrift für Rudolf Bernhardt* (1995), 289, 294.

[221] 1993 Vienna Declaration and Programme of Action, II, para 40.

[222] Beijing, Platform for Action, para 230 (l).

[223] A. Byrnes and J. Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?', 21 *Brooklyn J.I.L.* (1996) 679, 692.