

FOREWORD

THE DYNAMIC EVOLUTION OF INTERNATIONAL LAW: RISE OR DECLINE?

*Campbell McLachlan**

The problem of adjusting the functioning of the law to the perpetual antinomy of change and stability, and of justice and security, is not one peculiar to international law. ... there is ultimately no more effective challenge to the maintenance of the law than an immutability impervious to the needs of life and progress.

Hersch Lauterpacht¹

There is no inevitable march of progress in history or law. Everything that has been achieved can be rescinded, forgotten, tossed away.

Isabel Hull²

I **TRAJECTORY**

When in 1933 Hersch Lauterpacht wrote the chapter on "Stability and Change in International Law" in his seminal *The Function of Law in the International Community*, he sought to answer one of the objections of the critics as to the capacity of international law to function effectively: that it lacks the provisions for change that are a normal part of a domestic legal system. He argued that achieving the right balance between stability and change is in fact a constant issue for any legal system and that the international legal system, despite the absence of provisions for change, in fact had a much more dynamic capacity than was commonly supposed.

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1 Hersch Lauterpacht *The Function of Law in the International Community* (Oxford University Press, Oxford, 1933, repr 2011) at 256.

2 Isabel Hull "Anything can be rescinded" (2018) 40(8) *London Review of Books* 25 at 26.

Returning to this issue nearly a century later, the student of international law in the early 21st century is presented at once with a paradox. There has never been a time when law has been more widely invoked or deployed as a response to global problems. Yet, considering the enormous complexity and ambition of the international legal system today, its basic structures often seem ill adapted to its mission. Alongside the mass of law-making, the student must also confront its limitations: the extent to which the willingness of states to participate can wane as well as wax; a partial and incomplete normative coverage; the persistence of outmoded norms and decision-making structures; the seeming inability to achieve consensus within a diverse and numerous international community; and the sheer complexity of a legal system that is not necessarily either universal or coherent.

Moreover, the student of today must confront a much more existential threat to the operation of the international legal system in a political discourse that explicitly rejects the concept of international cooperation through and under law in favour of assertions of nativist autonomy.³ There is an uncomfortable sense that the debate about the role of international law is not business as usual and that, on the contrary as the historian Isabel Hull reminds us: "There is no inevitable march of progress in history or law. Everything that has been achieved can be rescinded, forgotten, tossed away."⁴ If the history of engagement with international law in the first half of the 20th century teaches anything it is that the trajectory of the dynamic evolution of international law is not linear. It can experience periods of decline and rejection, as well as periods of growth and adoption.⁵

These are very large themes. Indeed they are themes that go to the very root of the contemporary functioning of the international legal system. This special issue of the Victoria University of Wellington Law Review presents an edited collection of articles from leading voices in the field of public international law – scholars, judges and practitioners – that reflect on the different dimensions of the problem of change in international law.

Opening this debate, *Jutta Brunnée and Stephen Toope* claim that "the dominant views in [international relations] and international law scholarship underestimate international law's capacity to mediate stability and change", by focusing on the surface of law and external factors, such as interests and enforcement, not on the deeper structure of the legal system.⁶

3 James Crawford "The Current Political Discourse concerning International Law" (2018) 81 MLR 1.

4 Hull, above n 2, at 26.

5 Isabel Hull *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell University Press, Ithaca, 2014); Oona Hathaway and Scott Shapiro *The Internationalists and their Plan to Outlaw War* (Allen Lane, London, 2017); and Georg Nolte "Treaties and their Practice—Symptoms of their Rise or Decline" (2018) 392 *Recueil des Cours* 206.

6 Jutta Brunnée and Stephen J Toope "International Law and the Practice of Legality: Stability and Change" (2018) 49 VUWLR 429 at 433.

The structural challenges posed by the need for the international legal system to change over time are in fact as much the product of international law's relative dynamism as of the limitations in the system. The international community has created, and continues to generate, so much new law, and to do so in different ways that are not fully captured by our existing general analytical structures for the generation of new rules of law. A contemporary conception of the dynamic capacity of international law needs to capture these elements, which are internal to the design and operation of the international legal system, alongside the external geo-political forces that shape the consent of states to engage – a consent that can be withdrawn as well as merely withheld.

In order to frame the debate that follows, this foreword explores four aspects of the nature of contemporary international law, which have implications for the approach to the problem of change over time: (a) the idea of international law as an agent of change; (b) international law's constitutional function; (c) international law as a layered system; and (d) international law's institutional framework.

II THE IDEA OF INTERNATIONAL LAW AS AN AGENT OF CHANGE

The *idea* of international law itself, and of the function that it should perform in ordering international affairs is itself a significant motor for change. At critical moments that may not be evolutionary at all, but actually revolutionary. It may involve a deliberate rejection of a previous world order in favour of a new one that is inconsistent with the old: a paradigm shift.

Shirley Scott shows that a particular conception of international law, when championed by a powerful state, may exert a powerful influence over the shape of the system as a whole.⁷ She argues that the United States projected its power in the 20th century through espousing the importance of international law as an ideology. She does so in order to ask: what would be the significance from a legal as well as a political perspective, if (as the rhetoric increasingly suggests) that ideology is no longer upheld by the State that propounded it? Running alongside this development is a renewed focus on the extent to which other powerful states may hold different conceptions of the function of international law, conceptions that may gain increasing traction in a multi-polar, if less stable world.⁸

Both *Hunter Nottage* and *Bill Campbell* pursue the significance of pivotal moments that operate as a watershed for the paradigm within which international law operates. Nottage⁹ reminds us that the blueprint of the post-World War II legal order, the Atlantic Charter 1941, makes explicit the essential connection between peace and security on the one hand and economic cooperation on the other, so as to assure "the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms

7 Shirley V Scott "The Decline of International Law as a Normative Ideal" (2018) 49 VUWLR 627.

8 Anthea Roberts *Is International Law International?* (Oxford University Press, Oxford, 2017).

9 Hunter Nottage "Trade in War's Darkest Hour: Churchill and Roosevelt's Daring 1941 Atlantic Meeting that Linked Global Economic Cooperation to Lasting Peace and Security" (2018) 49 VUWLR 595.

to the trade ... of the world which are needed for their economic prosperity."¹⁰ He argues that, in a contemporary environment in which international trade rules are increasingly questioned and protectionism is on the rise, this fundamental idea should not be forgotten.

Bill Campbell¹¹ considers more generally the capacity of customary international law itself to respond to rapidly changing circumstances with a new paradigm – a process that has been called "Grotian moments" in development of international law.¹² He explores the potential of this idea in the emergence of new rules concerning the use of force against non-state actors.¹³

III CONSTITUTIONALITY

International law has been an incomplete system for so long that much of the effort of the last 70 years has been devoted to completion of a constitutional project that had been conceived earlier, but which faced political obstacles to its achievement. Salient examples of the coming to fruition of parts of the project conceived many decades before include the creation of the World Trade Organization,¹⁴ the International Criminal Court and the operationalisation of individual criminal responsibility¹⁵ and the completion of the International Law Commission's Draft Articles on State Responsibility.¹⁶ But no legal system is ever capable of *completion*, if by this is meant that it can achieve a final settled status from which no further change is needed. This would be to subscribe to a myth of perfectibility. The notion of perfectibility of international law also fails to take account of regression. International law lacks a general theory of withdrawal.¹⁷

Yet an understanding of the scope for change in the contemporary international legal system has to come to terms with the fact that much of the structure of contemporary international law – especially in the great multilateral conventions of near-universal application – has a constitutional character. These conventions provide a general structure for the organisation and exercise of public

10 The Atlantic Charter 204 LNTS 382 (14 August 1941), cl 5.

11 Bill Campbell "The Dynamic Evolution of International Law – The Case for the More Purposeful Development of Customary International Law" (2018) 49 VUWLR 561.

12 Michael Sharf *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press, New York, 2013).

13 Compare Jutta Brunnée and Stephen J Toope "Self-Defence against Non-State Actors: Are Powerful State Actors Willing but Unable to Change International Law?" (2018) 67 ICLQ 263.

14 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (signed 15 April 1994, entered into force 1 January 1995).

15 Rome Statute of the International Criminal Court 2187 UNTS 90 (signed 17 July 1998, entered into force 1 July 2002).

16 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC 26.

17 Laurence Helfer "Exiting treaties" (2005) 91 Va L Rev 1579.

power on the international plane. They were intended by their framers to be virtually immutable, because they establish fundamental principles of the international legal order within which states are to operate.

Early commentators on the Charter of the United Nations explicitly envisaged it as a constitution.¹⁸ The United Nations Convention on the Law of the Sea (UNCLOS),¹⁹ discussed in *Joanna Mossop's* article,²⁰ was described by its framers as a "Constitution for the Oceans".²¹ *Karen Scott* points out that many multilateral environmental agreements have a "quasi-constitutional" character, because they are cast as framework agreements and establish their own institutional arrangements.²² The World Trade Organization Covered Agreements have also been characterised as constitutional documents. Core international human rights instruments, including the Refugee Convention (the subject of *Susan Glazebrook's* article)²³ also serve a constitutional function.²⁴ They seek to define an irreducible core of rights common to humanity that international law protects.

There may be deeper links between international law and the constitutional functions of law. As *Eirik Bjorge* argues²⁵ national traditions of public law may be at least as fertile a source of the analogies that inform "general principles of law" as private law, which so much influenced early thought on international law's capacity to borrow from domestic law sources.²⁶ *Ken Keith* explores the relevance of general principles of law in the context of the rules of procedure of the International Court of Justice, where the Court has drawn upon such concepts as the good administration of justice

18 Guy Sinclair *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, Oxford, 2017) at 123.

19 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

20 Joanna Mossop "Can We Make the Oceans Greener? The Successes and Failures of UNCLOS as an Environmental Treaty" (2018) 49 VUWLR 573.

21 Tommy TB Koh, President of the Third United Nations Conference on the Law of the Sea "A Constitution for the Oceans" (speech, 10 December 1982).

22 Karen N Scott "The Dynamic Evolution of International Environmental Law" (2018) 49 VUWLR 607 at 621, citing C Brölman "Specialised rule of treaty interpretation: International Organizations" in Duncan Hollis (ed) *The Oxford Guide to Treaties* (Oxford University Press, Oxford, 2012) 507 at 509.

23 Susan Glazebrook "The Refugee Convention in the 21st Century" (2018) 49 VUWLR 477.

24 Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

25 Eirik Bjorge "Public Law Sources and Analogies of International Law" (2018) 49 VUWLR 533.

26 Hersch Lauterpacht *Private Law Sources and Analogies of International Law* (Longmans, London, 1927).

and the equality of the parties in developing its approach to procedural issues arising in cases before it.²⁷

In any event, international law and national law are linked by some key concepts. The way in which that linkage is drawn may have radical constitutional implications, as *Rayner Thwaites* explores in his discussion of the concept of nationality: a status that must do double service in both national and international law.²⁸

Taken too literally the analogy between the structural elements of international law with the constitutions of nations may mislead as much as it enlightens. National constitutions posit vertical structures for law-making that do not easily translate into the horizontal world of relations between states. But the analogy does serve to remind us of the perils of written constitution-making that may also be applicable in the context of multilateral treaties. A written text that is of its nature difficult to amend can serve to inhibit necessary change by shackling a community to outmoded objectives. The same may be true of core constituent documents in international law. Susan Glazebrook explores this problem in her examination of the ability of the Refugee Convention to respond to the challenges of displaced persons and mass migrations of today. UNCLOS, critically examined by *Osvaldo Urrutia*,²⁹ may actually inhibit attempts to control unregulated fishing with its starting premise of freedom to fish on the high seas subject to specified conservation exceptions – a premise that may no longer adequately reflect the parlous state of the world's fishery. He and Joanna Mossop both discuss the ways in which practice since 1982 has sought to develop more robust protections for the fishery and the environment within the Convention's framework.

IV A LAYERED SYSTEM

An emphasis on constitutionality should not blind us to the essential mutability of much of the corpus of international law – a mutability by design. This includes the ability of states to alter the substance of their treaty obligations by amendment, as well as the scope for reinterpretation through subsequent agreement and practice.³⁰ Furthermore, states often respond to new issues not by amendment but by concluding new treaties that may or may not fit neatly with their prior agreements.

27 KJ Keith "The Development of Rules of Procedure by the World Court through its Rule Making, Practice and Decisions" (2018) 49 VUWLR 511.

28 Rayner Thwaites "The Life and Times of the Genuine Link" (2018) 49 VUWLR 645.

29 Osvaldo Urrutia "Combating Unregulated Fishing through Unilateral Trade Measures: A Time for Change in International Fisheries Law?" (2018) 49 VUWLR 671.

30 Georg Nolte, Rapporteur "Subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries" in *Report of the International Law Commission: Seventieth session* UN Doc A/73/10 (2018) 11 at 16.

As Gerhard Hafner memorably put it:³¹

... the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law. This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration.

This is a feature of the way in which states have developed their treaty obligations in international environmental law, which Karen Scott discusses, and also in international economic law.

Even where the international architecture looks relatively immutable (as for example in the case of the Washington Convention on the Settlement of Investment Disputes (ICSID Convention)),³² recent developments, such as the Mauritius Convention on Transparency³³ and the proposals to use it a model that might insert a standing International Investment Court within the arbitration system of the ICSID Convention³⁴ show that states can modify quite radically their existing obligations *inter se* in ways that respond to current needs without necessarily amending prior treaty obligations.

The result is a set of primary obligations that are in a constant state of flux. This makes the operation of secondary rules especially important, yet those secondary rules that we do have for this purpose, notably in the Vienna Convention on the Law of Treaties,³⁵ are of necessity expressed at a high level of abstraction.

V INSTITUTIONAL FRAMEWORK

The evolution of international law is now affected not only by the direct actions of states, but also by the dynamics within the framework of international institutions. As *James Crawford* explains in the context of the disarmament of weapons of mass destruction, one explanation for the different fate of global efforts to outlaw chemical and biological weapons and the efforts to outlaw nuclear weapons may be found in the presence or absence of a multilateral treaty body to oversee compliance.³⁶

31 *Report of the International Law Commission on the work of its fifty-second session* [2000] vol 2, pt 2 YILC 1 at 144 (footnotes omitted).

32 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 (signed 18 March 1965, entered into force 14 October 1966).

33 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (signed 10 December 2014, entered into force 18 October 2017).

34 Gabrielle Kaufmann-Kohler and Michele Potestà *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?* (Geneva Center for International Dispute Settlement, 2016).

35 Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980).

36 James Crawford "International Law and the Problem of Change: a Tale of Two Conventions" (2018) 49 VUWLR 447.

The existence of an effective supervisory body representing all member states may also be key to maintaining the adherence of states to the jurisdiction of international courts and tribunals. It enables states parties as a whole to represent the long-term community interest in supporting the tribunal over the short-term interest of an individual state reacting to a particular decision.³⁷

International institutions also have an important role in developing international law, whether through the elaboration of delegated legislation under conferences of states parties; or through interpretation and application of their constituent instrument. That system relies for its normative effect on the consent of states. But it is developed through mechanisms that are not sufficiently or completely captured by a traditional model of legal sources or indeed by a conventional conception of international institutional law that concerns itself primarily with the actions of states.

VI CONCLUSION

Taken together then, the articles published in this issue present an acute picture of the challenges facing international law as a system, as it seeks to address the manifold complex problems that require international cooperation. They also reveal its extraordinary capacity for dynamism despite the apparent structural constraints of the system.

At a time when criticisms of international law are loudly proclaimed, it is important to be clear about the value of international law and its institutions from which, as Isabel Hull puts it, "we have all benefited, but which we have in recent decades neglected to explain or defend".³⁸ She continues:³⁹

... law matters and international co-operation is not a utopia but a functioning reality. Recently, it has been hard to hear that truth above the din produced by bad actors ... and by criticism of the neoliberal order from the left and the populist right, which obscures the positive effects of internationalism.

For all their imperfections, the mechanisms of international law are the only tools that we have to provide an ordered basis for international cooperation. As another eminent historian Tony Judt put it in 2011:⁴⁰

... the way to defend and advance large abstractions [such as democracy or human rights] in the generations to come will be to defend and protect institutions and laws and rules and practices which incarnate our best attempt at those large abstractions.

37 Yuval Shany *Assessing the Effectiveness of International Courts* (Oxford University Press, Oxford, 2014); and Karen Alter, James Gathii and Laurence Helfer "The Backlash against International Courts in West, East and Southern Africa: Causes and Consequences" (2016) 27 EJIL 293.

38 Hull, above n 2, at 26.

39 At 26.

40 Tony Judt *Thinking the Twentieth Century* (Random House, London, 2013) at 304.

The articles collected here seek to contribute to that goal by analysing international law's capacity to evolve in response to the challenges of the age.

Before concluding this foreword, I wish to thank some people and institutions not represented within these pages, who contributed significantly to the success of the academic research collaboration that produced this collection. The genesis of the articles was a Symposium convened under the auspices of the New Zealand Centre for Public Law at Victoria University of Wellington in December 2017. I wish to thank the Dean of the Faculty, Professor Mark Hickford, and my colleagues Professor Claudia Geiringer and Dr Dean Knight, Directors of the Centre for their support, together with the Centre's administrators, Anna Burnett and Rianna Maxwell.

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