

# *The nature of public international law*



## **Introduction**

This chapter will address important questions of the historical and philosophical development of public international law including the often-cited ‘party question’ of whether this discipline is law at all. Generally, a public international law examination will have one such general question on the nature of the subject.

This chapter contains four essay questions. The principles that apply to answering these questions are to draw up a plan in rough, including a proper introduction, a series of substantive points, and a conclusion. A danger with essays is to ramble in order to include everything you know—resist this temptation, as the marker is looking for an organized and coherent structure. Essay questions on theoretical topics require a specific style. They certainly require a base of academic opinion and plenty of examples on the points that you are making; but, for high marks, they also need a touch of original analysis. That would be your opinion on the topic based on your reading and reaction to the various opinions on the issue. It is quite acceptable to see both sides of a controversial issue, but then you must indicate clearly that you were persuaded by neither opinion and give reasons for so doing.

Therefore, success in answering these questions depends on a broad reading of the available literature and a historical and philosophical approach. Those students who spend the beginning of the course or perhaps even the vacation period generally reading on public international law and the history of (particularly) the twentieth century will be rewarded for their efforts.

These questions are difficult, as there is a temptation to engage in political arguments rather than develop an answer based on international law literature and cases. The three elements in any question must be the published work on the topic, any relevant international case law, and any relevant historical situations which support the existence of various rules of public international law. Therefore, the starting point for preparation

of these essay questions is to spend some time in the library doing research, as if you were preparing for an assessed essay or piece of coursework.

This first chapter and the remainder of the book will contain suggestions of relevant literature, but these are suggestions only. The well-prepared student will impress by locating recent relevant literature on any of the topics in this book by conducting relevant online database searches. It is absolutely essential to name the sources that you use, whether in case law or in academic literature. Quotations are never required in an examination, but summarizing the substance of the various arguments is critical.

For this topic, suggested literature includes: Fitzmaurice *et al.* (2007); the chapters by Neff *et al.* in Evans (2006); the introductory chapters in Cassese (2008); Shaw (2008); and Harris (2010).

## Question 1

'Modern international law has its origins in the Europe of the sixteenth and seventeenth centuries.'

Harris

Is this statement correct?



## Commentary

It has often been argued that international law derives from Western philosophy and history. There are two equally correct approaches to this question. One avenue of discussion is to take a traditional approach and trace the development of international law from the European enlightenment and Hugo Grotius, who is often credited as the 'father' of international law. A second and perhaps more interesting approach would be to argue that from ancient times every culture has developed some sort of international law to deal with relations with other cultures. An excellent source for that account would be the chapter by Neff (one of only a handful of international law historians) in Evans (2006), as he traces the history of international law from ancient history. It is this second approach which will be addressed in this answer.

A fully developed answer will need to address both the historical and philosophical development of the subject and display knowledge of the key philosophical figures in international law theory from ancient times through to modernity. It must mention specifically those aspects of international law which existed in the various historical eras.

As with all essay questions, it is important to maintain a position on the answer. There are no right and wrong answers in this topic, just versions of opinions. However, it is important to support your opinion with knowledge of, and reference to, the relevant literature. Each answer should begin with an appropriately considered answer plan, so it is important to take a few minutes before beginning your writing to consider the content and structure of the answer.



## Answer plan

- Developments in international law in other ancient cultures.
- Greek and Roman civilization and natural law.
- Continuation of natural law theories in the Middle Ages.
- The flowering of international law in the sixteenth and seventeenth centuries.
- The development of positivism in the eighteenth and nineteenth centuries.
- Modern international law theories.

## Suggested answer

Professor Harris's statement is not entirely correct, as international law has many different historical and philosophical roots, other than those of the Europe of the sixteenth and seventeenth centuries, a period when international law flowered. It can be argued that international law has developed historically and philosophically over many centuries, in many cultures and that a rudimentary system of international law existed even in ancient societies. To take issue with Professor Harris on his viewpoint one can refer to Neff's 'A short history of international law' in Evans (2006), which traces the development of international law in many historical traditions.

Neff persuasively contends that persons from even the most diverse historical cultures sought to relate to one another in a peaceful, predictable, and mutually beneficial way. His first historical example is Herodotus' description of '*silent trading*' between the Carthaginians and an unnamed North African tribe. He also points out that Mesopotamia, northern India and classical Greece had three areas of international law: diplomatic relations, treaty-making, and rules governing the conduct of war. As these are still three major areas of international law, it establishes the view that international law has long historical roots. He also discusses: the Islamic empire of the seventh century AD and the body of Islamic law that dealt with relations between states in the Islamic world and that body of the law regarding relations with the outside world.

Shaw (2008), however, argues that these systems were geographically and culturally restricted, as there was no conception of an international community of states. He does, however, admit that there was a powerful philosophical principle—the concept of natural law—which influenced the development of international law originating from Greek and Roman thought. This philosophy argued that a body of rules of universal relevance could be determined by human intelligence, and this constituted the roots of human rights. As Neff argues, one of the principal proponents of this philosophy was the Roman Cicero who argued that this law of nature would be '*spread through the whole human community, unchanging and eternal*'.

Neff and Shaw also discuss international law during the medieval period. Shaw points out that throughout Europe during this period maritime customs began to be accepted,

founded on the Rhodian sea law and which was a Byzantine work. In addition, there was a 'continental law merchant', which was a series of regulations and practices governing trade. Neff asserts that the area of diplomatic relations developed in this period, with diplomats increasingly being accorded a broad degree of immunity. He also argues that, beginning in around the eleventh century, European states began to conclude bilateral treaties which spelled out reciprocal guarantees of fair treatment. During this historical period, 'just-war' theory also developed in the writings of St Augustine and St Thomas Aquinas, who continued the natural law theory with the modification that all laws originated with God.

Certainly, one has to agree with Harris that the sixteenth and seventeenth centuries constituted what Neff terms 'the classical age' of public international law. The major scholar of that era was Hugo Grotius whose main work was *On the Law of War and Peace*, published in 1625, and in which he further developed the just-war theory and argued that the law of nations was distinct from the law of nature. The purpose of the law of nations was to regulate the external conduct of rulers. Shaw also points out that the development of international law was further assisted by the Spanish writers Francisco Vitoria and Francisco Suárez and the Italian Gentile, but agrees that Grotius can be seen as the father of international law. His enduring contribution in Shaw's view is his proclamation of the freedom of the seas. All of these writers continued the natural law tradition first developed by ancient Greek and Roman philosophers and continued in the Middle Ages with St Augustine and St Thomas Aquinas. Another scholar in the seventeenth century who continued this work was Samuel Pufendorf, who was an exponent of this naturalist school.

Therefore, up to the nineteenth century, international law had developed over centuries, with its flowering in the classical age. Although Grotius might be known as the chief architect of our modern international legal philosophy, the roots of his scholarship are in the ancient natural law texts and developments of mercantile law in the Middle Ages. In the eighteenth and nineteenth centuries another philosophical tradition developed in contrast to Grotius' natural law theory which has also influenced modern international law: positivism. Such scholars as Zouche, Bynkershoek, and Emerich de Vattel emphasized the development of international law through consensual practice, the precursor to the theory of customary international law. Vattel introduced the doctrine of the equality of states. However, natural law did not disappear as it gave way to concepts of natural rights in the writings of Locke and Rousseau and their political theories which influenced the French and American revolutions.

It is important to note that modern international law has also been profoundly influenced by developments in the nineteenth and twentieth centuries which up until the end of the Second World War was dominated by positivist thinking and the development of a plethora of bilateral and multilateral treaties, such as the treaties that constituted the results of the Hague Conferences, the establishment of the League of Nations, the Permanent Court of Justice, and, finally, the United Nations (UN). Neff argues that the instrumentalist approach gave positivism a moral ambivalence culminating perhaps

in the Berlin conference in 1884 which resulted in the imperial partitioning of Africa. Among the writers influencing international theory were de Martens writing a treatise on state practice in 1785 and Wheaton whose *Elements of International Law* in 1836 followed the same positivist pattern. However, by the middle of the twentieth century and the development of human rights conventions and concepts such as *jus cogens* and obligations *erga omnes* we see a return to natural law philosophy.

Recently in the late-twentieth and early twenty-first centuries, in addition to the staggering developments in international legal instruments (multilateral law-making conventions) and international institutions (the UN, World Trade Organization (WTO), International Criminal Court) we have seen the rise of a diverse range of international law theories, even though, as Boyle and Chinkin (2007) argue, there is a continuation of natural law and positivism. One recent example is critical legal theory which challenges all of the language that is used in international law, as embodied by Martii Koskenniemi in his writings, including ‘What is international law for?’ (reproduced in Evans, 2006). This theory seeks to deconstruct the language used in international law and analyses the basic meaning, as Koskenniemi’s famous book title indicates, of language which ranges from ‘apology to utopia’. Juxtaposed with this philosophy are writers on liberal internationalism, such as Teson and Slaughter and the New Haven school which examines the process of international law-making as expounded by Myers McDougall and Michael Reisman. All of these theorists examine international law through the lens of philosophical thinking that might influence the development of international law into the future.

In this brief historical review, it can be seen that international law was developed over many centuries and that the classical age of Grotius and the Spanish philosophers might only be one stage in the continuing development of public international law that continues into the twenty-first century. There continue to be divergent theories of international law, which will inform future development of the subject.

## Question 2

It can be argued that international law does not exist in a world of power politics—a statement that is particularly true since the war in Iraq.

Discuss with supporting academic opinions whether you agree or disagree with this statement.



### Commentary

Although this might be the ‘party question’ in international law, it is a particularly pertinent question given the international crisis that resulted over the war in Iraq in 2003 and the debate among international lawyers concerning the effectiveness of collective security. There has been

a long-standing debate between international law and international relations scholars over the nature of the international system—is it governed by power politics or the international rule of law? A summary of the realist school of international relations is found in a chapter by Koskenniemi entitled ‘Carl Schmitt, Hans Morgenthau, and the image of law in international relations’ (in Byers, 1999). A relevant article to discuss here is ‘Why the Security Council failed’ (Glennon, 2003). The main tenor of this article is that the post-war collective security system has disintegrated in light of the division over the war in Iraq. Glennon is the first article that I give to my international law students in the first class to stimulate debate concerning international law.

Support for the existence of international law can be found in Jennings and Watts, *Oppenheim’s International Law* (1992). This position is also expressed in academic arguments of an emerging international constitution. For this position, see: von Bogdandy (2006); Christian Tomushchat’s two Hague Academy lectures: ‘International law: ensuring the survival of mankind on the eve of a new century’ (1999); ‘Obligations arising for states without or against their will’ (1993); and Jürgen Habermas (2006).

A student can choose to agree or disagree with the statement but should discuss the opposing views on the existence of rules of international law by reference to theoretical literature. It is important to set out the position early in the answer and support it throughout. This question also illustrates the importance of keeping up to date with current affairs!



### Answer plan

- Discuss the theory of realism as embodied by Carr and Morgenthau.
- Discuss the support of later writers, including Glennon, in the wake of the war in Iraq.
- Introduce the idea of international constitutionalism and the opposing argument of Christian Tomushchat and Jürgen Habermas.
- Conclude with your view of this issue.

### Suggested answer

The statement that international law does not exist in a world of power politics is indeed controversial. It has its roots in the post-war international relations school of realism but this view was revived in the wake of the crisis over the war in Iraq. It is correct that the invasion of Iraq can be seen as epitomizing power politics and unilateralism as the United States and its allies arguably disregarded the rules of international law. However, one can also assert that, if anything, the effort by the United States and the United Kingdom to support their action by international legal arguments and the reaction against the war in Iraq by a majority of states has strengthened the international rule of law. This answer will describe opposing views on power politics and arrive at conclusions on this statement.

First, Koskenniemi in ‘Carl Schmitt, Hans Morgenthau, and the image of law in international relations’ in Byers (1999) outlines the history of the realist school of international relations. Realists such as Carr and Morgenthau argued that states were self-interested

actors engaged in a ruthless struggle for power, which can be defined as the ability of a state or states to control or influence directly how other states behave. Morgenthau (1954), was very influential in this field, and asserted that the international legal system was at the mercy of sovereign states. He stated that governments were '*anxious to shake off the restraining influence that international laws have upon their foreign policies*'. Another realist, Carr, proposed that international law could be changed at the will of states. Morgenthau supported his theory by arguing the serious weaknesses in the enforcement system of international law. His theory was later developed by a new generation of writers, such as Waltz (1979), who rejected international law as a structural element in the international system.

In the wake of the division over the Iraq war, the realist theory was revived. Glennon's (2003) provocative article argued that the division in the Security Council over the invasion of Iraq was the '*dramatic rupture*' that ended '*the grand attempt to subject the use of force to the rule of law*'. Glennon asserted that the Security Council would only be relevant if it dealt with matters not bearing directly on the upper hierarchy of world power. It has to be said that Glennon fails to take into account the efforts of both the United States and the United Kingdom within the Security Council to argue the legality of the intervention in Iraq as supporting previous Security Council resolutions. There is a clear disagreement about this argument within the international community but both sides argued international legality.

Although it may be argued that the realist theory is compelling, there is an equally persuasive opposite opinion. Jennings and Watts (1992) discuss the issue of the legal force of international law. They argue that the problem of whether international law is law properly so called, has been a problem of definition. Different definitions of what constitutes law can produce different answers to the question. For example, if a definition is drawn up based on municipal law it might be unnecessarily restrictive. Jennings and Watts propose that law was defined as a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power. They acknowledge that in the past the weakness in international law was the lack of enforcement but in the past half century an emerging system for the enforcement of international law is discernible. This includes the existence of law-making treaties and certain aspects of the activities of international organizations. Other indicators of growing maturity of the international legal order is the recognition that certain rules have the character of peremptory norms known in international law as *jus cogens* and Art. 103 UN Charter which establishes for members the superior nature of obligations under the UN Charter.

This view is supported by von Bogdandy (2006) which refers to the German school of international constitutionalism. Two of its members are Tomushchat and the famous philosopher Habermas. Tomushchat (1993) in his two series of Hague Academy lectures traces developments in international law in the wake of the end of the cold war towards rules and principles which govern the international legal community. In his lectures Tomushchat argues that that there is an international legal community guided by

basic rules which are the norms of *jus cogens* and obligations *erga omnes* and thus there is an emerging international constitution based on an international rule of law.

In further support of his thesis, Tomushchat argues that there are a number of instruments which set out the rules of the international legal order. These instruments include: **Art. 2(1) UN Charter** that sets out the principle of the sovereign equality of states; **Art. 38(1) Statute of the International Court of Justice** which contains a list of the different categories of rules of international law, including customary law and treaty law; and **Art. 26 Vienna Convention on the Law of Treaties** which declares that every treaty in force is binding on the parties to it and must be performed in good faith. This argument has been taken up more recently by Habermas (2006), in which he argues that the world dominated by nation states is in transition towards a global society. He addresses those sceptics such as Glennon (2003) who argue the end of collective security, as his main argument is that the international reaction against the war in Iraq, if anything, supports the idea of an international rule of law.

In examining the academic literature on this topic and indeed the international reaction concerning the war in Iraq as discussed by Habermas, one could agree with the view of Tomushchat. Since the advent of the **UN Charter**, there has been an emergence of an international legal community governed by the rules and principles of international law. These rules are embodied in law-making treaties and peremptory rules of public international law. The emergence of such a system can also be supported by the evidence of the debate over the legality of the invasion of Iraq as it can be seen that many states particularly in Security Council debates referred to a binding rule of international law, the prohibition against the use of force, in their arguments against the war. The British Chilcot inquiry regarding Iraq is concentrating extensively on issues of legality with testimony from former Foreign Office legal advisers. Based on the above arguments, it can be argued that the statement that international law does not exist in a world of power politics is incorrect.

### Question 3

'Any enforcement of international law rules is based on consent.'

Do you agree with this statement?



### Commentary

This is a question which begins the journey continued in the next chapter concerning the sources and enforceability of international law. One of the main critiques of international law is the lack of any clear enforcement mechanism which places its status as a legal system in

jeopardy. This answer can address the theoretical debate and important new developments in the rise of international courts and tribunals and the more activist Security Council since the fall of the Berlin Wall.

Cassese (2005) discusses this issue in his first chapter and a key influential article on this subject is Sir Gerald Fitzmaurice 'The foundations for the authority of international law and the problem of enforcement' (1956). In addition, the treatise by Jennings and Watts (1992) discusses the issue of international law enforcement.



## Answer plan

- Describe how international law might be enforced domestically and internationally.
- Discuss the theory of reciprocity as the rudimentary theory of enforcement.
- Illustrate the enforcement system within the **UN Charter**.
- Discuss the International Court of Justice (ICJ) as a consensual tribunal.
- Mention the other international courts and tribunals.
- Discuss the nature of customary law and treaties as mechanisms of enforcement which might not be consensual.

## Suggested answer

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This essay addresses one of the leading critiques of international law as a legal system, the lack of an organized enforcement system. International law clearly does not have an organized system of courts and tribunals, such as that of a domestic system. However, it can be argued that there is a system of enforcement that has traditionally existed in international law based on bilateral treaty arrangements and customary international law. There has been a developing and more sophisticated formal system of enforcement in recent years.

As Cassese (2005) has argued, there is not a permanent power structure in the international community and relations between states remain horizontal. He identifies three functions within the international system: law-making, law determination, and law enforcement. However, he has pointed out that with respect to the third function, international law has developed systems of enforcement. The first way that international law is enforced is the obligation to incorporate the rules of international law within domestic laws in order that breaches of international law can be enforced domestically. This is increasingly the case and an excellent example of the incorporation of international legal obligations within domestic statutes are the national statutes adopting the International Criminal Courts, which contain details of international criminal obligations, such as to refrain from committing the crimes of genocide, crimes against humanity, and war crimes.

A second way that international law is enforced is an international legal system based on reciprocity. The international system is based on those rules that all states would

like to be applicable to them. An example is diplomatic immunity which allows international diplomacy to operate and is based on both states respecting and protecting each other's diplomats. The main reason that international law is respected is that countries develop and respect customary and treaty-based rules that they would like to see enforced against them.

Finally, Cassese introduces a unique notion to international relations, that of collective responsibility. Although he argues that in the present legal community traditional rules based on reciprocity will constitute the bulk of international law, there are new rules with different content and import. A number of treaties which came into being after the First and, most importantly, the Second World War contain obligations that are incumbent upon each state towards all other contracting parties and which are not reciprocal. Community obligations have the following features: (1) they are obligations protecting fundamental values, such as peace, human rights, self-determination, protection of the environment; (2) they are obligations *erga omnes*, obligations towards all other states; (3) they are attended by correlative right that belongs to any state; (4) this right may be exercised by any other state; (5) the right is exercised on behalf of the whole international community to safeguard these fundamental values of the community. These obligations are often incorporated in law-making treaties, such as the **International Covenant on Civil and Political Rights (1966) (ICCPR)** and the **International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)**. Unlike a domestic legal system where an individual who breaches the law must suffer the consequences, a breach of this type of international law by an official of a state means that the whole state community will have to suffer the consequences of the breach of an international obligation. However, Cassese cautions that enforcement of these community rights is still rare in international law, although one could take issue with this opinion by pointing to the rise in international criminal tribunals holding individuals to account for violations of these community obligations.

Fitzmaurice (1956) in his influential article argues that traditionally enforcement meant self-help usually epitomized by the use of force. However, with the advent of the **UN Charter** and its prohibition on the use of force in international relations, the question remains as to what recourses are there for collective enforcement of the rules of international law. Fitzmaurice points out that in the **UN Charter** both **Chap. VII** in the event of a breach of a particular rule of international law (breach of the peace) and **Chap. VI** providing for pacific settlement of disputes do not provide a developed enforcement system as they are directed against only one delict. Particularly in **Chap. VI** the measures are strictly voluntary. Once again, although this opinion supports Cassese in his pessimism on collective enforcement, it can be argued that in recent years there has been an increase in Security Council activity in such areas as the response to the Iraq invasion of Kuwait, peace enforcement missions in Africa, and in counter-terrorism initiatives.

However, as Fitzmaurice points out, there is another organ which might be very influential and that is the ICJ. This is even more the case recently as, although the

international legal system clearly does not have a developed judiciary, there are now several international courts and tribunals. However, the main judicial arm of the international legal system remains the ICJ. This court is a consent-based court, as contested matters heard have to be sent to the court on consent of the parties or by way of a referral from the Security Council which must have the consent of the permanent five members of the Security Council. Fitzmaurice argues that the authority of a decision of the ICJ is very great. Most countries accept the ruling of the court. Furthermore, under **Art. 94 UN Charter** a party may have recourse to the Security Council if the other party fails to adhere to the court's judgment. At the time Fitzmaurice was writing, states had not resorted to the ICJ on a very frequent basis and it can now be seen that the use of contested cases to resolve disputes has increased greatly in the past fifty years. Furthermore, advisory opinions issued by the court have been influential in the development of international law. This is supported by Jennings and Watts (1992) who point out that in the *Military and Paramilitary Activities in Nicaragua* case the ICJ upheld the essential justiciability of even those disputes raising issues of the use of force and collective self-defence.

This argument could be extended even to such tribunals as the United Nations Human Rights Committee (UNHRC) which, although issues recommendations only, practice has revealed that those recommendations are often followed by the states involved in the process. The ad hoc international criminal tribunals have done much to clarify and enforce rules of international criminal law against individuals. This promises to be the case for the International Criminal Court where over 110 states parties have agreed to the jurisdiction of the court for the most serious violators of international criminal law and which saw the indictment of the president of Sudan.

An important point made by Fitzmaurice is that even without a developed system of enforcement, international law rules are binding and that international law is enforced only because there exist legally binding rules. As Jennings and Watts argue, states not only recognize the rules of international law as legally binding in many treaties but they also affirm constantly that there is a law between them. An important part of that law is the rules of customary international law which are developed based on the consensual legally obligatory practice of states. Therefore, it can be seen that however rudimentary, there exists an active system of enforcement in international law.

## Question 4

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The United Nations is an embryonic world government.

Discuss.



## Commentary

This question is one version of the commonly asked international organizations question. Its purpose is to enable the student to display detailed knowledge of the structure and powers of the UN. It is critically important to describe the organization of the UN from the standpoint of the **UN Charter** and the practice of the UN since the Second World War. Included in the discussion of the UN must be the ICJ and the student should be familiar with the **Statute of the International Court of Justice (1945)**.

There may indeed be a separate topic in the course for the UN but generally a discussion of this important international organization is within the introductory part of the course.

Shaw (2008) has an excellent chapter on the UN in his textbook. Fassbender is a scholar who argues that the **UN Charter** is the constitution of the international community—see his article and books, especially: ‘The meaning of international constitutional law’, in MacDonald and Johnston (2005); ‘The United Nations Charter as constitution of the international community’ (1998); and *UN Security Council Reform and the Right of Veto: a Constitutional Perspective* (1998). See also Stefan Talmon’s 2005 article in the *American Journal of International Law*, ‘The Security Council as World Legislature’.



## Answer plan

- Introduce the three features of government: legislative, executive, and judiciary as part of a constitutional system of governance.
- Describe the structure and powers of the UN.
- Describe the key organs of the UN, including the ICJ and its possible influence on law-making, law determination, and law enforcement.
- Conclude with your reasoned opinion on the question.

## Suggested answer

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In order to answer the question as to whether the UN is a world government, one first has to address the issue of what constitutes a government. From studying public or constitutional law, it is evident that any system of government has to have an executive, legislature, and judiciary. The powers of each three organs are set out in a constitution, which is either unwritten (examples are the United Kingdom, New Zealand) or written (examples are the United States, Canada). The UN, the major international organization set up under the 1945 **UN Charter**, has a unique and complex structure and specific powers. This essay will review the **UN Charter** powers and structure of the UN and argue that at this point neither the powers nor the structure are compatible with the domestic view of governance. The UN is a long way from what could be called a world government.

Fassbender discusses the **UN Charter** as the constitution of the international community. He argues (2005) that the principal reason for suggesting that the **UN Charter** is the constitution of the international community is that it is the one document which provides a statement of the fundamental rights and responsibilities of the members of the international community and sets out the values to which this community is committed. However, Shaw (2008) argues a contrasting opinion, that the **UN Charter** is simply the constitutive document of the UN itself and not a constitution for the Member States. However, in reviewing the **UN Charter**, the general statements concerning self-determination, sovereign equality, peace and security, and human rights certainly seem broader than the establishment of an international organization. By signing this treaty, these values are binding on all Member States.

Even though the **UN Charter** could arguably be seen as an international constitution that does not mean there is a world government. In reviewing the structure of the UN as set out in the **UN Charter**, there are seven major organs: the Security Council, General Assembly, Secretariat, Trusteeship Council, Economic and Social Council, and the ICJ. At this point, the Trusteeship Council no longer operates, so it is necessary to examine the remaining organs to see if they constitute executive, legislative, or judicial arms. With respect to the executive arm, the Secretariat is the administrative arm of the UN with the Secretary-General at its head. The Secretary-General is elected by the General Assembly and Security Council but the executive arm in this case does not propose policy; rather, it is directed to perform the will of the Security Council or General Assembly.

In fact, Shaw argues that it was the Security Council that was intended to operate as an efficient executive organ and it was given primary responsibility for peace and security. The Security Council consists of fifteen members, five of which are permanent (the United States, United Kingdom, Russia, China, and France), and these permanent members have a veto under **Art. 27 UN Charter**. However, Talmon (2005) has argued that the Security Council at various times has performed a legislative function, particularly in the counter-terrorism regime set out in **Security Council Resolution 1373**. As its decisions are binding on all Member States, this is more than an executive action. However, this legislative action is only in the field of international peace and security.

Shaw describes the General Assembly as the parliamentary body of the UN organization, as it consists of representatives of all of the Member States (currently 192). Yet Shaw acknowledges that it is not a legislature as, except for internal matters, such as budgets, the Assembly cannot bind its members. Its resolutions are purely recommendatory. Shaw summarizes that the Assembly is essentially a debating chamber and a forum for the exchange of ideas and the discussion of international problems. Conversely, it can be argued that in certain circumstances these resolutions can evolve into binding effect if they become customary international law which is binding on all states. Sloan in his article 'General Assembly resolutions revisited (forty years later)' (1987) argued that in certain circumstances General Assembly resolutions can constitute customary international law.

The Economic and Social Council has no domestic equivalent, as it is a body to perform the work of the UN in the economic and social spheres. It has proposed a number of binding international treaties on various issues including the two international covenants on human rights but these do not take effect until they are ratified by domestic governments. Once again it is not legislative.

The major component of the judicial arm of the international legal system is the ICJ part of the UN system. The ICJ continued the work of the Permanent Court of International Justice (PCIJ) established in 1920 under the auspices of the League of Nations. The **Statute of the International Court of Justice (1945)** is attached to the **UN Charter**. It is not, however, a supreme court of the international system. By and large, states have to consent to have their disputes litigated in the international system. Its decisions are binding only on those states that are before the court and not on the world community of states, although its decisions may be very influential.

There have been courts established by the Security Council. These are the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda. These courts have binding legal effect on those international criminals brought before them. The Security Council can also issue resolutions, such as the resolutions on terrorism, which can have binding legal effect. Another important source of judicial organs of binding legal effect is the appeals system in the World Trade Organization (WTO) and the Law of the Sea Tribunal. The world does not yet have an international human rights court and those states who allow their populations to bring their human rights violations before the international system only have views issued against them.

There are also a variety of regional systems such as the European Court of Justice and Human Rights, the Inter-American Court of Human Rights, and the newly established African Court of Human Rights which do or will issue binding decisions of international law but only on a regional basis.

It can be seen then that various organs can have executive and legislative functions and that the judicial system is not organized or generally binding on states. Furthermore, the legislative functions are only to constitute on occasion customary international law and binding resolutions in the field of international peace and security. One of the difficulties in this disorganized and non-hierarchical system is that various courts can issue conflicting rulings on the content and applicability of international rules. This phenomenon is known as the fragmentation of international law. In fact, the International Law Commission has established a working group to issue a report on this issue and its final report the 'Study on fragmentation of international law' was issued in 2006. It is clear that the ICJ is not a supreme court with powers to review decisions by the other organs and thus cannot constitute at this point an organized judicial arm of government.

Therefore this review of the structure and powers of the UN cannot support the proposition that it can be seen as an organized world government. It is a unique structure that has no equivalent in domestic law. It may well be in the future that the UN might evolve into a governmental structure, but not at this point in history.

## Further reading

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- Boyle, A., and Chinkin, C., *The Making of International Law* (Oxford: Oxford University Press, 2007).
- Byers, M., *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999).
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