'The task of building a world community is man's
final necessity and possibility, but also his final impossibility.'
—Reinhold Niebuhr, *The Children of Light and the Children of Darkness* (1944)

The Transformation of International Law

Darryn M. Jensen

International law has long had its critics. In theory, it provides an indispensable framework for the stable and orderly conduct of international relations, a framework created by *states* to serve their collective interests. But in practice the ambit of international law has become so broad that it now poses a threat to liberal democracy as international legal regimes come to apply directly to *individuals* through links with domestic courts.

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International law or the 'law of nations' has undergone a notable transformation over the past three decades. Thirty years ago, a discussion of international law could have been confined to issues affecting the relations between governments of different states. British legal scholar Michael Akehurst began the second edition of his textbook on international law (published in 1970) by defining it as 'the system of law which governs relations between states.'[1] While Akehurst acknowledged that private organisations, corporations and individuals might sometimes have rights and obligations under international law, he insisted that international law 'is *primarily* concerned with states.'[2]

Akehurst had a number of reasons for limiting his definition of international law in this way. As he put it, there are 'certain ideals which are regarded as desirable but not always practicable', and cannot be treated as rules of law 'because violations are too common to make enforcement practicable.'[3] Akehurst mentioned 'human rights' as an example of such an ideal. This concession, coupled with recognition that the United Nations is 'a political body, not a judicial body',[4] provided the foundation for a modest account of the ambit of international law.

International law, according to this account, consists largely of custom—that is, those norms of conduct in international relations that states obey habitually and that enable those states to co-exist in relative peace and harmony. Those norms of conduct correspond with and provide the content for rules of law. This law is 'international' because it is concerned with rights and duties that states have towards one another (as opposed to duties that states have towards their citizens and that citizens have towards one another).

International law, so understood, has been largely created by the actions of states.[5] That law is not static. Its content is being constantly refined, for novel situations can arise that may justify a state's contravention of a norm of conduct or generally-accepted rule, and that may set a precedent for similar action by other states confronted by similar situations in the future.[6] The content of a rule that a state shall not engage in warfare against another state except for the purpose of self-defence is not static because a novel threat to the security of a state or the safety of its citizens, which had not been imagined previously, might require a reassessment of what is encompassed by the concept of 'self-defence'.

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The practice of organisations such as the United Nations, insofar as those organisations represent states acting in concert, may significantly affect the evolution of the rules of international law.[7] But these organisations do not sit above the nations of the world.[8] Akehurst regarded the United Nations, in particular, more as a forum for cooperation and coordination between states than as an international legislator or adjudicator.[9] This highlights an important feature of the law of nations. A norm becomes law because states come to believe that adopting that norm of conduct is in their own interests. Its status as law does not depend upon a central authority commanding that the norm be adopted and enforcing compliance with that command.

It is no longer possible to confine a discussion of international law to relations between states. Sir Anthony Mason, a former Chief Justice of the High Court of Australia, has referred to 'that strong continuing trend in domestic legal systems to reflect rules and regulatory regimes that are international, regional or transnational in character.'[10] Sir Anthony drew a sharp contrast between what he described as the 'old' and 'new' international orders. The old international legal order was 'confined to the regulation of the interests and conduct of nation States and their representatives in limited matters of mutual concern' (such as 'war and neutrality, extradition, diplomatic matters, shipping, trade and postal co-operation').[11] The new international order was heralded by the proliferation of international

conventions on a wide variety of topics. Sir Anthony referred, in particular, to the adoption of conventions on human rights:

> Perhaps more than any other conventions, they seek to regulate conduct between State and citizen and between citizen and citizen. In that respect, they formulate universal standards with which nation States are obliged to comply and enforce compliance. These human rights conventions marked a new willingness to formulate universal standards for general adoption by nation States on matters which previously would have been thought to lie within the province of national autonomy.[12]

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The international legal order is no longer concerned merely with the rules and norms that govern relations between states. Anything that a number of states may agree to make the subject-matter of international law can become binding upon those states, even if it relates exclusively to what rules shall govern the relationships between individuals within the boundaries of those states. International conventions about 'human rights' would fall into this category. A state's obligations under the *International Covenant on Civil and Political Rights 1966* have nothing to do with the state's dealings with other states. The subject-matter of these obligations is largely domestic. The covenant imposes an obligation upon a state party to ensure that its domestic law protects individuals from infringements of their 'rights'.[13] This 'law' is 'international' only in the sense that it relies upon an agreement between states to provide it with whatever moral authority it has. The ultimate aim of international conventions concerning rights is to change the rights and obligations of individuals under domestic law.[14] The imposition of obligations upon states is merely a means to that end.

It is appropriate to refer to this law—as Sir Anthony did—as 'transnational' to distinguish it from the traditional 'law of nations' content of international law. Sir Anthony acknowledged that supra-national decision-making on matters affecting domestic law has the capacity to undermine democratic processes within the nation state,[15] but he placed the onus upon individual states to ensure that 'national democratic decision-making processes' are able to 'play a part' in the making of treaties and other international agreements.[16] Similarly, he suggested that it is 'extraordinary' that an Australian complainant must go to an international body in order to raise a complaint against the Australian government, but he laid the blame for this anomaly at the feet of the Australian government for 'failing to provide a mechanism for adjudication in the national legal system'.[17] The claim that these human rights conventions make to the allegiances of states and their citizens was not seriously questioned.

A disturbing feature of the new 'transnational' law is that it turns the relationship between norms and law on its head. Whereas the content of the law of nations emerges from the norms of conduct that are actually observed by nation states in their dealings with one another (and its legitimacy as law is based upon observance by most nation states most of the time), the new 'transnational' law consists of agreements to change domestic norms of conduct. While a principle may become 'international law' by being articulated in a treaty or convention, state parties may have to take further action to ensure that the requirements of the principle become a norm of conduct within their respective territories—that is, a matter of habitual obedience on the part of most states and their citizens.[18]

The *Convention on the Rights of the Child*, which has been widely ratified, is a good example of this phenomenon. Two features stand out. First, there is a catalogue of very broadly-defined entitlements,

which all children are supposed to have.[19] Second, there are numerous acknowledgments that action by individual states is necessary to provide those entitlements[20] and that state action will often have a central role a part in determining the precise form of those entitlements.[21] These principles are not strictly matters of 'international law' but rather aspirations formulated in an international forum, which may then be used as a basis for political claims in each individual nation state.

The use of the 'international law' label to describe conventions sponsored by the United Nations has led to the growing assumption that such multilateral agreements constitute the *only* legitimate source of law in the international legal order. Such a view places the United Nations at the pinnacle of a transnational legal order, which in turn derives its legitimacy from 'the will of the international community'. This 'will' is revealed primarily through the deliberations of United Nations institutions. Such an understanding of international legal order has acquired a degree of respectability among some Western opinion leaders. The President of France, in an address to the United Nations General Assembly in September 2003, said:

> In an open world, no one can live in isolation, no one can act alone in the name of all, and no one can accept the anarchy of a society without rules. There is no alternative to the United Nations . . . Multilateralism is the key, for it ensures the participation of all in the management of world affairs. *It is a guarantee of legitimacy and democracy, especially in matters regarding the use of force or laying down of universal norms*.[22] (italics added)

This view regards 'universal norms' as the product of the will of a representative body rather than as the product of the regularities of conduct adopted by nation states. A similar attitude can be found in the reasoning of the prominent Australian judge and human rights campaigner, Michael Kirby. Justice Kirby has suggested that the extension of human rights in the international sphere requires us to 'redouble our effort to secure the subscription by all countries to the international treaties on human rights'[23] and to bring 'the principles of fundamental rights and the tablets in which they are enshrined in international instruments down to application in ordinary cases in the courts in all parts of the world.'[24] The customary law and democratic processes of individual nation states are being called to accede to the demands of the 'will' of the so-called international community.

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The dilemma for liberals

The transformation of international law presents a dilemma for liberals. It is certainly a liberal aspiration that people in all parts of the world should enjoy a generous degree of political, economic and social freedom. This aspiration can be stated in negative terms—that is, liberals wish to eliminate the arbitrary use of power.[25] The coercion involved in a system of law based upon community custom is non-arbitrary because the rules of that system reflect what most of the people do most of the time and are grounded in a broad consensus about what is just. Those who are required to obey such rules do so through 'internal' volition. Rules that are not grounded in custom, but abstract reasoning as to what ought to be, are arbitrary rules that require some people to accede to the will of others. Insofar as these rules are backed by coercive measures, the volition to obey is purely 'external'.

The human rights agenda sponsored by the United Nations fails the test of non-arbitrariness in two main ways. First, the United Nations does not represent people but rather states.[26] United Nations delegates (including those from democratic nations) are not directly accountable to the citizens of the nations which they represent. Their 'world' is populated by other UN delegates,

UN bureaucrats and lobbyists from various transnational non-government organisations (NGOs), and it is from these people (apart from their own governments) that they are most likely to take their cues.

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It is difficult to see why the pronouncements of an organisation comprised of states about the rights and freedoms of individuals should *necessarily* be accorded any greater legitimacy than the outcomes of the legal and political processes in the individual nation states in which the affected people live and (hopefully) vote. Ultimately, it is the interests of states and the representations of those NGOs sufficiently well-resourced to have their voices heard in UN fora which inform the deliberations of the UN. While domestic politics in nation states may also be influenced and captured by interest groups, the distance between decision-makers and the governed is smaller so greater scrutiny and accountability can be expected.[27]

Second, 'human rights' is a malleable concept. Western liberals tend to understand human rights as individual claims to a domain of freedom defined in negative terms—that one's body, speech, religious worship or economic activity not be subjected to undue interference. The governments of developing nations, many of which are anything but model liberal democracies, have managed to use their voting power in the United Nations to move the human rights agenda away from the protection of traditional Western-style individual rights towards the recognition of 'collective rights'[28] and 'positive economic and social rights'.[29]

This appropriation of the language of rights to assert group-based or nation-based claims against other groups or nations represents a fundamental shift in human rights rhetoric. A right of 'peoples' to 'self-determination'[30] is less concerned with the domain of freedom to be enjoyed by individuals than with a group's right to a particular type of outcome. The pursuit of the desired outcome may involve the appropriation of the resources of individuals and, accordingly, conflict with negatively-defined individual rights.[31] The same may be said of certain 'economic and social' rights assigned to individuals, such as the 'right' to work or the 'right' to education.

Human rights conventions consist of potentially conflicting claims, which reflect the contentious social visions of their proponents. This is a problem that will hamper any attempt to enumerate rights. The selection and definition of those rights will necessarily reflect the practical preoccupations and ideological leanings of the small group of people who do the selecting and defining.[32]

International law as the custom of transnational communities

A system of law that is designed from first principles cannot hope to pass the test of non-arbitrariness. Since different people bring different experiences and perspectives to bear upon the design task, a universally-acceptable rational justification for any particular catalogue of rights and duties is likely to be elusive.

The neo-Thomist philosopher of human rights, Jacques Maritain, unlike many contemporary human rights advocates, appeared to realise this. Maritain thought that human rights were founded upon 'natural law', but suggested that the post-Enlightenment 'West', while continuing to use the language of 'natural law' and 'natural rights', had departed from the ancient and medieval foundations of the idea. The post-Enlightenment view was to accept something as being rationally justified only when it could be 'traced from a ready-made, pre-existing pattern which infallible Reason had been instructed to lay down by infallible Nature, and which, consequently, should be immutably and universally recognized in all places of the earth and at all moments of time.'[33]

The post-Enlightenment exaltation of theoretical reasoning differs from the view of St Thomas Aquinas that people come to know natural law through practical reason—that is, the ability to recognise that particular forms of conduct are either compatible or incompatible with the good of the human being.[34] Maritain suggested that knowledge of natural law was 'first expressed in social arrangements rather than personal judgments'.[35] Since awareness of natural law is experiential rather than the product of rational deduction from agreed principles, the content of the legal order cannot be deduced all at once.

Other scholars, from outside of the Thomist natural law tradition, have articulated similar critiques of rational construction. The Christian theologian, Emil Brunner, thought that Christianity must stand on the side of liberalism against totalitarianism, but that it was bound to oppose a modern, rationalistic form of liberalism that sought 'to deduce from first principles of justice a whole system of laws of timeless validity.'[36] Social custom was a surer foundation for legal order, because it expressed 'the wisdom of the generations which is not consciously the wisdom of the individuals'.[37] It was custom that engendered spontaneous obedience to norms of conduct that have contributed to the well-being of community and, in doing so, relieved those communities of the need for detailed regulation of the minutiae of daily life and the extensive use of force to ensure compliance.[38] Brunner thought that the post-Enlightenment rationalists had, by their denigration of social custom, sowed the seeds of totalitarianism.[39] A similar emphasis upon the imperfection and provisionality of human constructions of justice may be found in some of the later works of Brunner's American contemporary, Reinhold Neibuhr.[40]

A discussion of the 20th century critics of rational construction would be incomplete without mentioning Friedrich Hayek. One of the central themes of Hayek's work was that human beings are not omniscient and cannot be expected to have a detailed plan providing for all of life's contingencies. Since individual humans are not omniscient, they need rules to guide their choices of action. The orderliness of their lives and the success of the communities to which they belong will depend upon how well those abstract rules are adapted to the requirements of human flourishing. The problem is that an exhaustive knowledge of these requirements and of the causal relationships between observance of particular modes of conduct and the fulfilment of these requirements is beyond the grasp of any single human mind. Nevertheless, individuals and groups of individuals can learn to repeat forms of conduct that have brought them success in the past. These forms of conduct are not rationally justified, if by rational justification one means that it can be demonstrated beforehand that their observance would lead to a desirable outcome. There is a sense in which 'the proof of the pudding is in the eating':

> [Rules of conduct] are preserved by proving themselves useful, but, in contrast to scientific theories, by a proof which no one needs to know, because the proof manifests itself in the resilience and progressive expansion of the order of society which it makes possible.[41]

Custom, properly understood, consists of a perpetually evolving set of social norms . . . While criticism and revision of social norms in the light of particular events is desirable, attempts to reconstruct an entire legal order are not.

The idea that law ought to be grounded in custom is not a 'conservative' idea. Custom, properly understood, consists of a perpetually evolving set of social norms. Hayek also contemplated that successive generations could improve the social norms of their community. This could be done 'by remedying recognisable defects by piecemeal improvement based on immanent criticism . . . that is, by analysing the compatibility and consistency of their parts, and tinkering with the system accordingly.'[42] While criticism and revision of social norms in the light of particular events is desirable, attempts to reconstruct an entire legal order are not.

Maritain, Brunner, Niebuhr and Hayek were united in maintaining that it is the practical knowledge of the participants in a community, as revealed in many successive human interactions, that provides the best evidence of what conditions are conducive to the orderly interaction of the community's members and, hence, the success of the community as a whole. Rules of conduct (being merely statements of generally-accepted norms of conduct) are forever subject to revision in the light of their successive applications to novel situations. The definition of rights and duties will always be a work-in-progress.

If the expansion of the international legal order proceeds hand in hand with the emergence of community founded upon shared customs, the use of power can be the exception rather than the rule.

The problem of international order

One would expect practical agreement about rules of conduct to arise most readily in relatively small communities where all members have frequent contact with one another. Where law is grounded in custom, the emergence of community and the emergence of legal order are contemporaneous, mutually reinforcing events. One would expect an international legal order to be much less developed than national and sub-national legal orders simply because the interaction between people situated in different parts of the world is relatively infrequent and the sense of belonging to a community of people is less strong.

Reinhold Niebuhr insisted that the problem of international order is one that has to be tackled with a dose of realism. World community, he wrote, is our 'final necessity' because history 'extends the freedom of man over natural process to the point where universality is reached.'[43] World community is, at the same time, our 'final impossibility' because we are 'wedded to time and place and incapable of building any structure of culture or civilisation which does not have its foundations in a particular and dated locus.' [44] In other words, human interaction on a global scale—made possible by technological innovation—creates a demand for global order. This has led to the gradual eclipse of tribal or nationalist religious understandings by religions and philosophies, which claim to be universally valid.[45] But while we should embrace the possibility of world community, we should take care that our attempts to define the norms of this community do not outpace the emergence of a real, underlying community.

Niebuhr thought that 'the less a community is held together by cohesive forces in the texture of life the more must it be held together by power.'[46] Power takes on an importance in world community that it does not take on in smaller communities because the shared experience of world community members is so slight that it cannot be relied upon as a basis for cohesion. Only 'the preponderant power of the great nations' could provide the basis for cohesion.[47] If the expansion of legal order proceeds hand in hand with the emergence of community founded upon shared customs, the use of power can be the exception rather than the rule.

This type of international legal order would differ from a rationally constructed order in several ways.

First, it would speak less of the 'international *community*' and more of 'transnational *communities*'. These communities need not be mutually exclusive groups of states or individuals. States and individuals may be members of different communities for different purposes. Just as we might understand the nation-state as an association between people who share a common language and cultural identity for the purposes of their mutual security and well-being, we might understand the various forms of transnational interaction (which include, but are not limited to, commerce and intellectual exchanges between citizens of different nation-states) as providing the germ for the emergence of numerous communities extending across state boundaries. Each of these communities would possess its own norms of conduct, expressed as either formal rules in treaties and commercial contracts or simply unexpressed mutual understandings. Such norms

would enjoy legitimacy because their observance facilitates orderly interaction between members of the community and because they represent the opinion of the many rather than the rationally constructed will of the few.

Second, an international legal order grounded in custom avoids centralisation of authority. It insists that problems of coordination between members of a community be addressed within the community in which the problem exists. One should not seek to place all problems of international coordination and order under one authority. This is not to deny that peak international bodies, such as the United Nations, do not have a role to perform, but that it should be limited to resolving the coordination problems that exist among those member countries represented in its decision-making processes. The United Nations and other organisations comprised of nation-states are proper fora for decision-making about matters in which the member states have a mutual interest in their capacity as states (such as the security of nations from aggression by other nations and by terrorist organisations). Coordination problems between individuals in different states should not be part of the brief of an organisation whose membership is comprised of states.

Furthermore, disputes between individuals within the territory of a single nation-state are not disputes between members of a transnational community, and ought to be resolved according to the norms of the community to which the individuals belong. Whether homosexual acts ought to be punished or whether a landlord ought to be able to refuse to rent premises to unmarried couples are matters that ought to be resolved at no higher level than the nation-state community. It is difficult to see why the rules that prevail in Bangladesh on these matters ought not to differ from those in The Netherlands. The important thing is that whatever formulation of rights and duties is adopted, it reflects the opinion of the community of individuals whose rights and duties are defined thereby. The relevant community may, in many cases, be a much smaller and more closely-confined community than the nation-state itself.[48]

Third, there are limits to the universalizability of definitions of human rights. That is not to say that statements of 'universal' human rights are useless. Jacques Maritain was a supporter of the 1948 Universal Declaration of Human Rights, but he understood that a statement of this kind could not be the final word on rights for all times and places. He envisaged an ongoing discussion about how these rights could be exercised and how they could be reconciled to one another.[49] Statements about human rights should be understood as statements of aspirations. Liberals may continue to hope that increased interaction between people from countries with relatively illiberal institutions and those of countries with relatively liberal institutions will expose the former to the merits of a conception of rights grounded in individual freedom of action. If that process is to occur, it should occur because people from illiberal societies come to realise that their institutions (including their rules of conduct) conflict with their individual well-being and that of their community.

Statements about human rights should be understood as statements of aspirations.

The sheer improbability that almost all people in all places will be able to agree upon definitions of the rights of individuals in relation to all matters is reason enough to be modest in our attempts to establish a transnational legal order. It is unfortunate that the customary 'law of nations' and international conventions on human rights have become merged in one category called 'international law', which has become the province of the United Nations.

It is time to end the confusion. The definition of the rights and duties of states in their dealings with other states falls properly within the realm of international organisations comprised of states. The definition of the rights and duties of individuals, if it is not to be arbitrary, depends upon those definitions reflecting the opinion of the community to which those individuals belong. The pronouncements of the community of nations—as represented by the United Nations—should not be and cannot be the final word on that matter.