The International Court of Justice and the Judicial Function

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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First Edition published in 2014

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014933415

ISBN 978-0-19-964663-0

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

I

On the International Judicial Function

That States remain at the heart of the international legal system[1] is a commonplace. As the only holders of plenary international legal personality, it is they who are principally responsible for the behaviour that creates and changes international law. Yet a distinctive characteristic of international law remains the diffuse and multi-layered process through which it is developed. In no small part because it has no legislature, international law permits judicial institutions, and especially the International Court of Justice, to play a 'fonction de suppléance législative',[2] to fill in the interstices of international law and to resolve the uncertainties caused by the conflicting practices of States. In so doing, as Hans Kelsen has noted, the ascertainment by the court of a principle of international law has a 'constitutive, not merely a declaratory character',[3] and the judicial function fulfils an important role in safeguarding of the coherence of the international legal system.

In this limited sense, the judgments of the Court proffer indications as to the future orientation of international law, conferring as they do an imprimatur of impartiality and objectivity in the articulation of international legal rules. These become readily available to be adopted by other law-creating actors, thus evolving from mere judicial pronouncements into new rules of international law.[4] Thus, the procedures and processes whereby international courts operate are of great relevance, as the question arises not only as to whether judges are objective, but also whether such procedures are objective: '[t]o say that judicial law-making produces rule choices that are objectively correct is simply to say that it produces rule choices that cannot be attributed to the ideological sympathies of the judges'.[5]

In every legally organized community, there exists a range within which a judicial institution may operate and where its conduct is regarded as being appropriate to its function. The very definition of that range sets limits that a judiciary may not legitimately transgress, lest it risk being tarred with the epithet of 'judicial

[1] R Higgins, *Problems and Process* (OUP, Oxford, 1994), 39.

[2] P Weil, 'Le droit international en quête de son identité: Cours général de droit international public' (1992-VI) 237 *Recueil des Cours* 9, 142.

[3] H Kelsen, *Pure Theory of Law* (M Knight trans, 2nd edn, University of California Press, Berkeley, 1970), 238.

[4] E Jouannet, 'Le juge international face aux problèmes d'incohérence et d'instabilité du droit international: Quelques réflexions à propos de l'arrêt CIJ du 6 novembre 2003, Affaires des Plates-formes pétrolières' (2004) 108 *Revue générale de droit international public* 917, 946.

[5] DM Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, Cambridge, Mass, 1998) [hereinafter 'Kennedy, *Critique of Adjudication*'], 24.

activism'.[6] Within that range, domestic common law courts play a law-creating role within their system, but one which history and tradition have reinforced as a quintessentially *adjudicative* role: that role is structurally, procedurally, and institutionally defined *vis-à-vis* a legislative function competent to transform policy choices into valid law.[7] As with civil law jurisdictions, the defining characteristic of positivity, at least in the modern constitutional State, is that the legislature is vested with the power to enact positive law.[8] Yet in a 'naïve constitutional extrapolation',[9] the argument is made that international judicial institutions should act as a primary engine for the development of international law, 'not only because judges make law but because their availability casts a shadow on all disputes subject to their jurisdiction and makes settlement of such disputes *in accordance with la*w more likely'.[10] Such argument ought to have little purchase in an international legal order where the very notion of 'separation of powers' is fundamentally alien. The Lockean separation of powers doctrine,[11] at its root, legitimates the legislative exercise of law-creation and the judicial exercise of law-application on the basis that the legislature, elected by and acting on behalf of the democratic *sovereign*, can use the legislative procedure to change the law.[12] Yet in international law this

[6] See F Zarbiev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' (2012) 3(2) *Journal of International Dispute Settlement* 247, 252. The term is almost always used pejoratively, to imply that a judicial institution has engaged in an enterprise that is inappropriate for its mission.

[7] Kennedy, *Critique of Adjudication*, see n 5, 25–6.

[8] An idea that dates at least as far as the doctrine of the separation of powers: see eg Baron de Montesquieu, *De l'esprit des lois* (1748), bk 1, ch 3 and J Locke, *The Second Treatise of Government* (Awnsham Churchill, London, 1689), ch XII [hereinafter 'Locke'].

[9] P Allott, *The Health of Nations: Society and Law beyond the State* (CUP, Cambridge, 2002), 59. Good examples of such extrapolation abound: see EU Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society (1998) 20 *Michigan Journal of International Law* 1; EU Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?' (1999) 31 *New York University Journal of International Law and Policy* 753; FR Tesón, *A Philosophy of International Law* (Westview, Boulder, 1998), 21, 25; FR Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53; R Falk et al (eds), *The Constitutional Foundations of World Peace* (SUNY Press, Albany, 1993); SJ Toope, 'Emerging Patterns of Governance and International Law', in M Byers (ed), *The Role of Law in International Politics* (OUP, Oxford, 2000), 91; A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579; M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866; But cf S Marks, 'The End of History? Reflections on Some International Legal Theses' (1997) 3 *European Journal of International Law* 44; M Koskenniemi, 'Intolerant Democracies: A Reaction' (1996) 37 *Harvard International Law Journal* 231.

[10] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP reissue, Cambridge, 2005), 578 [emphasis in original]. This faith in adjudicatory processes is hardly limited to the Court, but extends generally to judicial institutions, both international and domestic: see JI Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law and Policy* 697, 704; CP Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Policy* 709, 751; L Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' in BA Simmons (ed), *International Law* vol IV (Sage, London, 2008), 95.

[11] Locke, see n 8.

[12] A von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23(1) *European Journal of International Law* 7, 19–20.

is impossible: international courts do not operate as a component element of a system in which exists a legitimate and functioning legislature which is empowered to enact valid law. This characteristic has even led Herbert Hart to deny the categorization of international law as a legal system, lacking as it does both the secondary rules of change and adjudication which provide for the separation of powers between the legislature and the judiciary, but also 'a unifying rule of recognition specifying "sources" of law and providing general criteria for the identification of rules'.[13]

Resort to adjudication, and the concomitant increase in international adjudication, is seen as a faith in the rule of law writ large.[14] So goes this line of reasoning, the international judicial function is portrayed as the archetypal forum where law may be carefully separated from politics: 'a legal system such as the international legal system does more than simply create expectations and promote stability. It also fulfils the essentially social function of transforming applications of power into legal obligation, of turning "is" into "ought" or, within the context of customary international law, of transforming State practice into customary rules'.[15] Because formal rules are meant to be applied and enforced by international courts with an acceptable degree of certainty and predictability, where the protection of equitable procedural principles is offered to disputants, such courts embody the aspiration of an international society governed by the so-called 'Rule of Law', as was prominently advocated by Sir Hersch Lauterpacht.[16]

As has been considered elsewhere, the foundation of Lauterpacht's concept of law has been influential in his view of adjudication as a vehicle for the development

[13] HLA Hart, *The Concept of Law* (2nd edn, OUP, Oxford, 1994), ch X, 213–14.

[14] H Thirlway, 'The Proliferation of International Judicial Organs: Institutional and Substantive Questions' in N Blokker and H Schermers (eds), *Proliferation of International Organizations* (Kluwer, The Hague, 2001), 251 [hereinafter 'Thirlway'], 255 [footnotes omitted]. Many of the arguments justifying the expansion of the *institutional* judicial function (the proliferation of international courts and tribunals) mirror those of the *systemic* judicial function (that of the development of international law through increased use of the Court), as 'more' is seen to equal 'better' in this regard: for some representative work in this regard, see eg C Brown, *A Common Law of International Adjudication* (OUP, Oxford, 2007); PS Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' (2004) 25 *Michigan Journal of International Law* 929, 960; RY Jennings, 'The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers' in L Boisson de Chazournes (ed), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution: Proceedings of a Forum Co-Sponsored by the ASIL and the HEI* (ASIL Publications, Washington, 1995), 2; T Treves, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?' in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty Making* (Springer, Berlin, 2005), 587; T Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267; B Kingsbury, 'Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *New York University Journal of International Law and Policy* 679; Charney, see n 10; and J Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1999) 271 *Recueil des Cours* 101.

[15] M Byers, *Custom, Power, and the Power of Rules* (CUP, Cambridge, 1999), 6.

[16] Sir Hersch Lauterpacht's work will be analysed throughout this book; bare references to 'Lauterpacht' will thus be to him and not to his son, Sir Elihu Lauterpacht, unless clearly indicated otherwise. See also GG Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957-II) 92 *Recueil des Cours* 1, whose theme was the 'Rule of Law', one of the most 'consistent incarnations of the role of the judge'.

of international law.[17] This faith in adjudication, besides situating the judge at the centre of legal development, also equates to a faith that the entrenchment of international law itself (its institutional landscape, the deepening understanding of its conceptual foundations and rules) *ipso facto* entails progress, strengthening the evidentiary basis of international law and eliminating the resort to the use of force in settling disputes. So to do situates the exercise of the international judicial function not merely as before the parties, but as against the entirety of international law.[18] Discerning the extent to which this faith is manifest in the practice of the International Court of Justice constitutes the *raison d'être* of this book.[19]

A. Why the International Court of Justice?

The primary evidence used here is found in the judgments of the Court, which are a part of a nearly century-old process of implementing law at the international level. The only survivor of the League's institutional framework, the Court casts a tremendous shadow on the development of international law. This was by design: the Court was 'given the formal characteristics and the symbolic attributes of a court . . . [and] is isolated physically, symbolically and systematically from the rest of international legal and social reality. And it reproduces faithfully very many elements of the sign-system of the ideal-type court . . .'.[20] Whether perceived as a positive or a negative, the Court, the most august of all international courts, sees significant normative force ascribed to its judgments: as Antonio Cassese put it,

> . . . there is no gainsaying that the Court is playing an important role in the area of law-making. Since at present, and on political grounds, states are loathe to create new rules by treaties, the scope and impact of customary law on international relations is expanding at a rapid pace. However, the difficulty with custom is that, apart from traditional rules, which are undisputed, emerging rules or rules that are indicative of new trends in the world community need, in order to be recognized, the formal imprimatur of a court of law. No other court is in a better position than the ICJ to play this role. Once the ICJ has stated that a legal standard is part of customary international law, few would seriously challenge such a finding.[21]

[17] See generally IGM Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8(2) *European Journal of International Law* 264.

[18] H Lauterpacht, *The Function of Law in the International Community* (Clarendon, Oxford, 1933), 320.

[19] Taking seriously, perhaps, Martti Koskenniemi's exhortation that '[i]t is high time that "international adjudication" were made the object of critical analysis instead of religious faith': see M Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' in Y Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference: Proceedings of the Workshop held in The Hague on 6–7 September 2007* (Martinus Nijhoff, Leiden/London, 2008), 127, 152.

[20] P Allott, *Eunomia: A New Order for a New World* (OUP, Oxford, 1990) [hereinafter 'Allott, *Eunomia*'], 240.

[21] A Cassese, 'The International Court of Justice: Is it High Time to Restyle the Respected Old Lady?' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP, Oxford, 2012), 239, 240.

In this role, it is thus cast as an important player in the process through which norms and rules of international law are made.[22] Structured in their particular judicial form, the Court's pronouncements resonate throughout international society more significantly than academic writings, the writings of *ad hoc* arbitration bodies, domestic courts, or even the policies of States.[23] What is more, the Court's general jurisdiction over all of international law allows it to make a claim of general competence, even over other international courts in their respective areas of specialization. But more importantly, to understand its judgments is considered by the epistemic community of international lawyers[24] as the benchmark of one's grasp of the international legal discipline, as these form the backbone of the primary reference materials on international law to validate an argument. As such, the relevance of the Court is systemic: a court such as the ICJ 'epitomises the *social* reality of the society of which it is an institution [and] epitomises the *legal* reality whose legal relations it enforces'.[25] The Court is a reflection, conditioned by the international legal order in which it operates.[26]

By definition, a court is chiefly concerned with the resolution of the disputes submitted to it. Even in municipal legal orders, to assume that courts may properly discharge the function of safeguarding a wide range of interests and values betrays an 'extravagant faith' in adjudicatory processes, against which even a former President of the Court has cautioned: 'the International Judge alone cannot assure peace'.[27] The Court ought not to be analogized to an 'academy of jurists', tasked with maintaining 'a more principled and long-range vision on the overall global agenda' whose educative jurisprudence can set a universalist framework, as has passionately been advocated elsewhere.[28] To do so would place an undue burden on judges to deliver on the 'promise of justice',[29] objective repositories of knowledge and expertise for the safeguarding of international law.

Situated thus, the Court is by definition constrained by the necessities of the international legal system in which it operates. Yet even this modest capacity has

[22] Thirlway, see n 1, 270–8; G Guillaume, 'The Future of International Law and Institutions' (1995) 44 *International and Comparative Law Quarterly* 848; PM Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 *New York Journal of International Law and Policy* 791, 798–807. Cf J Verhoeven, 'A propos de la fonction internationale de juger et droit international public' in P Gerard, F Ost, and M van de Kerchove, *Fonction de juger et pouvoir judiciaire. Transformations et déplacements* (Publications des facultés universitaires Saint-Louis, Bruxelles, 1983), 447, 448, who considers the Court's role within the international judicial function to be bereft of anything but formal authority.

[23] N Singh, *The Role and Record of the International Court of Justice* (Nijhoff, Dordrecht, 1989), 175 calls the development of the law the Court's 'inherent function'.

[24] A term borrowed from A Bianchi, see A Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy*' (2013) 4 *Journal of International Dispute Settlement* 1.

[25] Allott, *Eunomia*, see n 20, 241.

[26] See Jouannet, see n 4, 942.

[27] J Basdevant, *Peace Through International Adjudication?* (ICJ Publications, The Hague, 1949). See also A Mills and T Stephens, 'The Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1, 19.

[28] R Falk, *Reviving the World Court* (University Press of Virginia, Charlottesville, 1986), 191.

[29] M Koskenniemi, 'What is International Law For' in M Evans, *International Law* (3rd edn, OUP, Oxford, 2010), 32, 52.

normative consequences: high judicial institutions will often be presented with the type of case, such 'that a considerable element of legal policy will and within permissible legal limits, should enter into the process of deciding them, taking account of the climate of opinion of the day, and of prevailing social and economic tendencies'.[30] In this respect, the role of the international judge is more modest, in that she ensures coherence by smoothing out conceptual inconsistencies and curing various inadequacies of the international legal system, but always within the legal framework, as international judges are not entrusted with 'wholly re-inventing' the law.[31] This role is all the more important given the claim that 'ideology influences adjudication, by structuring legal discourse and through strategic choice in interpretation',[32] a claim which challenges many of the assumptions upon which the judicial role rests. It is therefore important to distinguish from the outset between denying the ideological element in judging and denying that judges make decisions that are important to other, ideologically-driven actors within a legal system.

The substantive international law produced by the International Court is obviously a question for debate between those with different views on international law. Yet it is an entirely different matter to claim that the discursive process which leads to its judgments has ideological content and significance in its own right—a claim strenuously denied by judges, who would consider it an affront to the judicial role to assume any ideological slant to the discursive procedure which they use.[33] After decades of operation and a considerable body of case law behind it, the Court is an ideal case study for the essential thesis underlying this book.

Thus, the emphasis of this study is not merely on the Court itself but rather on how it conceives the idea of an international judicial function. The purpose here is to develop and apply a meaningful conceptual framework to understand properly the Court's understanding of the judicial function in international law. The Court serves here as a heuristic device, a magnifying lens which focuses the debate regarding wider theorizing on the judicial role within the international legal process. In this respect, the extra-judicial statements of judges are also of significant interest for the purposes of the present book, and will be referred to when relevant.

The approach that will be adopted throughout the book, even if somewhat theoretical at times, remains pragmatic in its aim. It strives not to present some novel information about what the Court does, but rather, a new framework for apprehending the Court's work, using information that is readily available. The approach may thus be empirical, but the consequences are conceptual and more abstract. The Court is neither to be reified nor attacked, but described and analysed for what insights one may glean about the international judicial function and, with it, the nature of international law.

[30] GG Fitzmaurice, 'Judicial Innovation' in DW Bowett (ed), *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Oceana, Dobbs Ferry, 1965), 25–6.

[31] JL Brierly, 'The Legislative Function in International Relations' in H Lauterpacht and CHM Waldock (eds), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Clarendon Press, Oxford, 1958), 212, 213.

[32] Kennedy, *Critique of Adjudication*, see n 5, 19.

[33] Kennedy, *Critique of Adjudication*, see n 5, 23.

This book operates under certain assumptions: it adopts an approach that abandons the mantra of State-centrism and accepts that international courts are at the intersection where law and politics meet, where the normative can be transformed into the concrete. The Court, designed to be objective and impartial, is equally the institutional embodiment of a delicate compromise between the sacrosanct sovereignty of the State and the economic and political pressures for a stronger 'international community'. The international law that it applies and interprets is defined by that compromise, and it is for this reason that one cannot properly understand the Court without moving away from the viewpoint that evaluates its work with a pre-conceived notion of its ideal purpose.[34]

B. A Caveat about the Use of the Term 'State-centric'

Care should be taken from the outset to clarify what is meant by the term 'State-centric' in this book. As Susan Marks has argued, the term 'State-centric' has both a descriptive and a normative dimension, and often is construed as a derogatory description attaching to the individual or body so being described.[35] The term 'State-centrism' takes on three different forms: describing States in opposition to non-State actors; a technique to diminish the importance of institutions, procedures, and norms, in favour of international law's significance and context; or an interpretive posture which gives undue weight to State sovereignty.[36] Moreover, it is often (and sometimes pejoratively) associated with a specific form of positivism which 'recognizes as law everything that is "posited" as law by states and nothing else; and . . . professes to discover what states have "posited" as law by referring only to their customs . . . based on their tacit, and their treaties, which are based on their express, consent'.[37] Far from being apolitical, this is a form of positivism which also embodies a moral and political judgment.[38]

This work attaches the third definition to 'State-centrism', that is, that it is an interpretive posture giving undue weight to State sovereignty. To characterize the Court as State-centric in this manner would be to suggest that it demonstrates a preference for the interpretations of international law which heed the considerations of States,[39] whether parties to a dispute or more generally. Within that specific context alone, this term is meant to draw attention to this oft-criticized aspect of the Court's judgments, and is used only to demonstrate the weakness and

[34] As Koskenniemi would exhort in *From Apology to Utopia*, see n 10, 539–40.

[35] S Marks, 'State-centrism, International Law, and the Anxieties of Influence' (2006) 19 *Leiden European Journal of International Law* 339, 339–40.

[36] Marks, see n 35, 340.

[37] JL Brierly, *The Basis of Obligation in International Law* (Stevens & Sons, London, 1958), 17.

[38] See B Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401, who makes precisely this argument, specifically with reference to Oppenheim's particular 'brand' of international legal positivism.

[39] Weil, see n 2, 77.

limitations of considering the Court's judgments in this narrow context. Chapter III, in particular, will study the extent of this claim of State-centrism in the Court's case law, as the Court generally adheres to classical positivist understanding of international law that posits the consent of States as the exclusive basis for the validity of law. The Court's understanding of State sovereignty and consent is therefore a necessary conceptual element in the legitimation of norms and rules of international law.

C. Structure of this Book

Chapter II lays out the groundwork for later chapters by describing the history behind the choices that led to the creation of the present Court, and which are reflected in its constitutive Statute. Chapter III attempts to discern precisely the Court's character as an international judicial organ. By distinguishing the function of a court within municipal legal orders with the Court's particular position within the United Nations system, especially with respect to its advisory function, this chapter argues that the Court's 'judicial character', as understood by the Court itself, is considerably more complex than appears at first. The caveat on consent, in particular, is more nuanced and requires careful scrutiny.

Once the argument has been fully developed that the Court can only be understood through its structure and self-consciousness as a judicial institution, Chapters IV, V, and VI delve into the Court's inner processes. Chapter IV analyses the Court's drafting process and the function its judges seem to ascribe to their separate and dissenting opinions, so as to discern the extent to which the Court's duty to give reasons embodies within it a commitment to rationality and to the legal process. Chapter V, by contrast, analyses the concept of judicial impartiality in the Court's reasoning, focusing specifically on identifying the various structural constraints incumbent upon it. This chapter examines, as a case study, the role of the judge *ad hoc*, where the research materials are considerably more plentiful than on the function of an elected Member of the Court. Finally, Chapter VI examines the Court's adherence to a relatively strict rule of precedent, especially in the light of its decisions in the various *Genocide* and *Use of Force* cases involving the former Yugoslavia. The claim made here is that the Court's adherence to precedent is a claim to normative authority, to safeguard its own legitimacy and to preserve its authority as an organ of international law.

Chapters VII, VIII, and IX focus more precisely on the Court's pronouncements and are meant to consider the wider legal order or system in which the Court operates. Chapter VII, after analysing the concepts of 'international community' and 'international public order', argues that the Court's judgments suggest a minimalist view of the international legal order and the Court's role within it. In Chapter VIII, the theory of completeness and the prohibition of *non liquet* are revisited through a re-interpretation of the Court's advisory opinion on the legality of nuclear weapons, where the Court's deafening non-answer is considered in the

light of the insights that may be gleaned regarding the Court's view on the international judicial function. Chapter IX, finally, concludes with some reflections as to how the findings in this book might be relevant in furthering our understanding of the nature of international law.