Preface

Does international law really achieve the goals we want it to? This book suggests not. We hold high hopes for international law, from banning landmines and cluster munitions, to upholding human rights in the face of domestic repression, to fostering coordination of international solutions to climate change, to prosecuting war criminals and holding senior politicians accountable for genocides, to mediating conflicts and preventing wars. Almost uniquely amongst areas of law, international law is vested with moral significance by its advocates; it is said that many of the world's international and even domestic problems can be resolved by upholding international law. Yet therein lie its dangers. I suggest these aspirations are bound to be disappointed.

I am not the first to express such pessimism; several scholars have expressed the view that in an anarchic world of self-interested states harbouring their own military force to defend and conquer, there is no good reason to expect the high aspirations of international law to be observed. But I do not think international law is irrelevant. I am of the view that it makes a real difference to international relations and even domestic politics. It makes the world of international relations vastly more complex, by adding to the anarchy of states a series of autonomous international institutions, each with their own interests, goals and powers. International courts exist, purporting to mete out international justice. Yet this image, so carefully cultivated, is a charade. International courts exist not to resolve disputes impartially, but to cement their ever tenuous positions and pursue the growth of yet more international law. International courts are necessarily weak, because no strong and rational state would agree to create a genuinely strong and independent institution, lest it subsequently turn against it. Forever fearful of irrelevance, the international courts that exist seize power for themselves where they can, and otherwise make decisions in accordance with the wishes of the strong. They also promote the intellectual and bureaucratic growth of the discipline of international law which sustains them. Their overriding goal is self-perpetuation. This book examines several such international courts, and finds them wanting in these ways.

I first became interested in international law, and by extension the international organisations that propagate it, when I worked for two

such institutions. One was the World Bank (until 2005); the other was the Office of the High Representative of Bosnia and Herzegovina (until 2007). I must express gratitude for my employment by both of them. The former, because it gave me the opportunity to live in Washington, DC, a wonderfully metropolitan city with an exceptionally high quality of life; the latter, because I met my wife while working there, I wrote my first book as a result and I spent over two years enjoying the most fascinating professional experience of my career. Yet both organisations, in related ways, were the most abysmal employers one could imagine. In the World Bank, I was initially astonished by its gross over-staffing. It employed far too many people, each of whom in consequence had not nearly enough to do. This was a surprising observation to make in respect of one of the world's most prestigious financial institutions: the greater majority of the staff spent the greater part of their time spinning wheels. I was therefore led to the question: how could it be, that such a renowned institution could employ so many people to do so little of relevance? The next surprise in store for me was the frequently perplexing bureaucracy: as a pretext to justify their existences, these surplus employees had created interminable internal procedures and rules to sustain their otherwise superfluous roles.

Moreover, the World Bank was exceptionally poor in terms of the service it offered its clients. The procedures it followed were so cumbersome that its sovereign borrowers increasingly preferred to turn to regular commercial lenders for financing. Whereas the World Bank would take upwards of two years from project inception to signing a loan agreement, and then perhaps another six months for the initial disbursement of funds, a commercial bank could lend money within six weeks. The World Bank would also tie its borrowers up in the bureaucracy of its procurement procedures – sometimes requiring changes in domestic legislation – and endless paperwork required to comply with World Bank project management and reporting requirements. Lost in a sea of its own procedures, the organisation seemed incapable of competing within the real world. Perhaps the most challenging question that faced me was why its members – that is to say, almost every country of the world – did not simply shut it down and save themselves a lot of time and money.

Yet the organisation also showed great tenacity in perpetually reinventing itself. It went from a bank lending money principally to middle income sovereigns for infrastructure projects, to a 'knowledge bank', opening its own research institute and presenting itself as a pioneer in the latest fashions in development thinking. It also started lending to low income countries, a difficult decision to justify in policy terms given such nations lacked sufficiently robust institutions to manage and spend the money in accordance with coherent projects or policies. It started lending to the

private sector. It even developed itself as an international arbitration centre. The World Bank became a pioneer in self-preservation, through endless reincarnations. That way, perhaps nobody would spot just how poor it was at its core function – lending money. Thus it remains in existence today, going from strength to strength, arguably sturdier than ever.

The Office of the High Representative of Bosnia and Herzegovina (OHR), the international governor of the country created by the peace agreement ending the 1992–95 war, was also dysfunctional, but in quite different ways. Whereas the World Bank was grossly overstaffed, OHR was absurdly undermanned. I was expected to run a complex legal and judicial reform project with just a handful of people. The task was impossible. At the same time, I worked for an international civil servant with the most extraordinary and draconian powers of imposition over Bosnia's domestic elected leaders, without any form of due process or review. We were dictators, at times even tyrants. The ways we used, and misused, our powers, were the subject of my earlier book and a number of articles.¹ This led me to the question why the states who staffed and funded the organisation, including the British government, allowed the institution to get away with conduct so reprehensible in its disregard for basic principles of constitutionalism and rule of law that it would never have been tolerated in those countries' home jurisdictions. I then sought to draw broader lessons from my twin experiences. As an international lawyer, I started to wonder whether the deficiencies I had observed in the way international law is practised by international organisations were attributable to my misfortune in choosing infelicitous working environments, or reflected a more structural malaise in the field as a whole.

In time, I came to realise that absence of legal or any other kind of accountability was a recurrent feature of international organisations, a theme I developed in an earlier extended essay.² Despite these institutions being responsible for the propagation and implementation of the greater weight of international law and treaties, they operate beyond the scope of that law or of any law. They are also, I came to discover, remarkably autonomous from the interests of the states that have ostensibly come together to create them, that fund them and imagine they direct their activities. The lack of legal accountability within these organisations also had one remarkable common consequence: they are unpleasant places to work. Unaccountable to anyone, their managers setting their own direction without reference to national or international law or the wishes or interests of their donors, staff become freed from the common decencies expected in civilised workplaces. Being heaving bureaucracies in which process is valued over results, they are seldom meritocratic. There is no rational division of labour between staff, no system for ensuring successful

people are promoted, and managers (of which there are far too many) have no incentive to ensure their departments work effectively. Sexual and other sorts of harassment are known to be rife, as are corruption and nepotism. International organisations have no independent mechanisms for resolving complaints by or against staff. Their work is not open to the public eye, because they are typically exempt from freedom of information legislation in the countries in which they operate. Indeed they are almost invariably exempt from all domestic laws, through a doctrine of 'legal immunity' which provides that international organisations are impossible to sue in any court. Nor, as a rule, can they be sued in international courts. They operate in a legal vacuum.

Despite these unsettling features, international organisations play an enormously important role in the development of international law. First, they draft it. International organisations are involved in the preparation of most, if not all, international treaties. The World Bank's loan agreements had the status of international treaties; OHR would issue executive decrees which purported to have effect in international law. Second, they monitor and even administer international law. Third, they purport to enforce it. The various international courts and tribunals which this book describes are themselves international organisations, with all the attendant unusual features and internal problems that I found in the organisations for which I worked. If organisations so dysfunctional are responsible for propagating, adjudicating, monitoring and developing international law, what is that likely to say about international law itself? These were the questions that led me to write this book. I wanted to understand what it is about the international system that renders it so pathological.

I appreciate that coming to this preface for the first time, the reader may not yet be persuaded that the dysfunction I experienced is as pervasive as I suggest. One of the purposes of this book, therefore, is to provide evidence of widespread peculiarities within international law, as propagated by international organisations. Most importantly, I wish to demonstrate that international law has none of the features we consider characteristic of effective domestic law. It stands in a class of its own, and not one towards which other legal systems should aspire. Moreover, there is no reason to believe that international law will develop the characteristics we have come to expect of effective legal systems. The other purpose of this work is to develop a general theory that explains why international law, while so prevalent, is so ineffective – in other words, why it exists at all in its unsatisfactory contemporary condition. Most theories of international relations and international organisations so far developed in the literature do not achieve that. I therefore develop a somewhat different theory of international relations, which takes its lead from a so far modest literature

on dysfunction in international organisations, and I try to expand it into an account of the political economy of international law.

This book commences with a discussion about the two principal theories of international relations, realism and liberalism. My own theory of international relations emerges from a discussion of the strengths and weaknesses of each of these two fundamentally opposed positions. I am often surprised by the inability of scholars in each camp to understand the perspectives of the other; for both positions clearly have merit, and yet the possibility of compromise between the two schools is apparently impossible, reflecting cemented ideological divisions. I attempt to break these divisions down, and sketch out the principles of my own theory which (I hope) incorporates the wisdom of both sides of the debate, through developing a more sophisticated account of the determinants of states' behaviour than prior theories have hitherto considered. The book then proceeds to a chapter which considers the growth, since the end of World War II, of international organisations and international law. The purpose of this study is to trace the relationship between international law and international organisations, and to suggest that the proliferation of the two is intimately related.

There follows a series of chapters considering specific international courts and tribunals that purport to apply and enforce international law. I consider in each case whether these tribunals operate in accordance with the standards we expect of domestic legal systems. With one intriguing partial exception, I conclude that every international tribunal under consideration is grossly lacking in one or more fundamental ways. I ask in each case why this is, and I seek to explain such structural deficiencies in the international structures states have set up. My closing chapter asks whether things might get better – whether the current unsatisfactory state of international law is a mere passing phase, a staging post on the road to Damascus. I conclude this is most unlikely, because the political and economic dynamics that motivated development of effective and independent court systems in western countries are lacking in the international system. International law is an aberration, developed by mischievous and flawed analogy with domestic legal systems. International law will never transform itself into the sort of robust transnational legal system we would hope for.

Writing this book has involved not just copious quantities of empirical and academic research, but also many intensive and critical discussions with friends and colleagues to ensure my thesis stands respectably robust in the face of a wealth of scholarly literature already written on the subject. Gratitude for help and inspiration in bringing this work to completion is due to Phil Bocking, Stephen Browne, David Chandler, Victoria

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NOTES

1. See in particular Parish, Matthew (2009), *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia* (London: I.B.Tauris); Parish, Matthew (2009), 'The demise of the Dayton protectorate', *Journal of Intervention and Statebuilding*, Special Supplement December; Parish, Matthew (2009), 'International officials', *Austrian Review of International and European Law*, 13, 79; also available on the Social Science Research Network at <http://ssrn.com/abstract=1651519> (last accessed 2 November 2010).
2. Parish, Matthew (2010), 'An essay on the accountability of international organizations', *International Organizations Law Review*, 7(2), 277. A number of the themes of this work are foreshadowed in that paper.