



## **Is International Law Really Law?**

**Abdul Hamid Kwarteng<sup>1\*</sup>**

<sup>1</sup>*School of Law, Zhongnan University of Economics and Law, 182# Nanhu Avenue, East Lake High-tech Development Zone, Wuhan 430073, P.R. China.*

### **Author's contribution**

*The sole author designed, analyzed, interpreted and prepared the manuscript.*

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### **ABSTRACT**

There has been an ongoing and probably a never-ending debate on whether international law is really law. Thus, there exists a group of scholars who are of the view that international law is not a real law while another group of scholars on the other hand also argue that international law is real law. The article contributes to the existing literature on this argument by giving a different dimension to the argument. That is, the article situates the argument of whether international law is a real law or not, into the theory of Realism and Liberalism and by outlining the main arguments provided by the two schools of thought to support their respective views on the topic under discussion, an objective conclusion was drawn at the end.

The methodology adopted for the study is the qualitative approach of which the works of renowned scholars that focus on debating whether international law is a real law or not were studied and this aided in a comprehensive analysis of the arguments surrounding this debate and eventually leading to an objective conclusion. Materials used include information from the internet, journal articles, policy documents as well as all other important reading materials such as the dailies, press releases, news items and official reports.

The article finally concludes by stating that international law is a real law because enforcement is not entirely the only hallmark of what constitutes law and even domestic law in a broader sense does not possess full enforcement as argued by scholars who are of the view that international law is not really law.

\*Corresponding author: Email: [kwarteng115@yahoo.com](mailto:kwarteng115@yahoo.com);

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## 1. INTRODUCTION

One of the most controversial issues that continue to be debated among scholars of international law relates to whether the international law could be regarded as a real law or not. In a general sense, there are two schools of thought engaged in this argument: the realist and the liberals. Both schools of thought advance various reasons to support their arguments and this article looks at the arguments advanced by both the realist and the liberals after which a conclusion is drawn.

To attempt to answer the question whether international law is really a law or not, it is important to understand some of the basic concepts of what constitutes a law which will aid in a comprehensive understanding of the nature of international law so as to be able to present an unbiased and objective argument.

### 1.1 Definition of Law

Perhaps the inability to answer the question as to whether international law is a real law or not stems from the fact that the concept of law itself is quite a difficult and controversial concept to define. Thus, law has been defined in different ways by different scholars and as such, there is no universally accepted definition of what law is or what constitutes the components of the law.

John Austin, an English philosopher in his book titled "Lectures on Jurisprudence: or the Philosophy of Positive Law", page 5, defined law as "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him" [1]. From this definition, it can be deduced that according to Austin, law consists of rules and principles that are formulated and enforced by a sovereign and recognized authority.

Professor Hart in his book the "The Concept of Law" described the law as a system that is made up of primary and secondary rules made to regulate behaviour in a society or community [2]. That is to say that, laws are made to guide the behaviour of individuals so that individuals are aware of what is expected from them and the likely consequences of their actions if they go contrary to the established laws.

St Thomas Aquinas in his work "Summa Theologica: Part I-II" in page 90 defined law as "Nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated" [3]. Law in this sense is seen as something that is prescribed by a recognized authority for a group in a particular society so as to promote the common good. Thus, there exists a sovereign authority that prescribes these laws in order to promote the common good. In this sense, the people to whom the law is made for are obliged to abide by those laws.

In the view of Max Weber, Law exists if an external body or authority is given the mandate to enact rules and principles and compel compliance by coercion, either physical or psychological if the need arises so that the accepted standards will be followed by all or avenge acts of infringement or breach of the rules and principles [4].

Law in its simplest form could be defined as recognized legitimate standards of behaviour that bind a community together. The use of the word recognized standards of behaviour in this definition of law means that, for certain standards of behaviour to rise up to the status of being called the law, it should achieve some form of recognition. There are scholars who argue that standards of behavior that are recognized by the authorities of the state or a country is what is referred to as law and there are other scholars who also argue that such standard of behavior should be recognized by both the authorities of the state as well as the individuals or the citizens of the country before it could be regarded as law. Most of the scholars that argue that standards of behavior should be recognized by both the states and its citizens before it could be regarded as law are natural law scholars who believe that the law should be just and should serve the interest and well-being of the people and as such citizens have the right to revolt and reject any law that is not just.

Law contains rules and principles that are to be obeyed by members of a community with the objective of regulating behaviour and binding a community together to achieve a common goal or purpose. Law has some basic characteristics among which include: it has universal application, it is coercive and also it is permissive.

### **1.1.1 Universal application**

this means that law has a universal application to all persons and individuals within a particular framework [5]. The universal application of law should be done without any discrimination to any individual with respect to their status in society, race, colour, religion, etc. This is what is normally referred to as the concept of rule of law where the law is seen as supreme and applied to all people in an equal manner.

### **1.1.2 Law is coercive**

law possesses some coercive force which punishes violators [6]. In a society, community, etc. there will always be people who will not abide by the accepted legitimate standards of behaviour of the community or society and these people must be forced to obey by punishing them when they deviate from the accepted standards. In this sense law is coercive and in most cases, it has a coercive agency to ensure conformity and compliance.

### **1.1.3 Law is permissive**

while the law is coercive to a large extent, it is also permissible. Individuals can establish their own relationship within the larger framework of the law [7]. Thus, individuals have the liberty to also form their own contracts or laws within the larger framework provided these contracts do not conflict or contradict the accepted standards of the larger community. For example, the signing of personal agreements between two or more people on how to operate or establish their business is permitted in most domestic laws only if the contract does not conflict or breach any provisions in the domestic law.

## **1.2 Why the Need for Law?**

There are several reasons why a community or society needs laws, however; this article looks at only the basic reasons why the law is needed:

### **1.2.1 To regulate behaviour**

Society needs rules to regulate behaviour and perhaps avoid chaos [8]. Without laws to govern behaviour and regulate the relationship among persons, there is always the possibility of violence and chaos. Individuals without laws or rules to govern their behaviour will be living in a state of fear with constant violence against all which could be equated to what Thomas Hobbes

refers to as the state of nature where the life of man is solitary, short, brutish and nasty. To avoid such situation, laws are needed to govern and regulate the behaviour of persons as well as protect life and property in a community. It is also important to note that the laws should have an enforcing agency to ensure compliance and punish deviants.

### **1.2.2 Law makes things easier**

with the availability of laws in a community or society, things are easier and more convenient. This is to say that, each and every person in the society knows what the laws are because the laws specify what a person can and cannot do as well as the likely punishments associated with breaking the laws. This in a way creates some form of certainty and makes things quite easier for the individuals in a particular community. One can make long-term decisions with others, both far and close due to the fact that they know the rules and that if one party breaches his part of the agreement the other party can seek for redress at the court. There is someone to enforce the law: whenever there is any disagreement between two parties, one is always certain as to what to do to seek justice thus by taking the case to court for the court to enforce the law.

## **1.3 What is International Law?**

International law at its initial stages of development was referred to as the laws of national thus a body of rules and principles that governed the relations among civilized states in their dealings with one another. This definition of international law is very narrow and viewed as the traditional definition of international law [9]. Obviously, there are a lot of gaps in this definition as it is difficult to determine which state is civilized and which state is not and more importantly, the scope of international law has widened to govern the relations not only among states but other entities as well.

With the growth of Non-Governmental organizations (NGOs) most probably after the WWII as well as the growing business transactions, agreements, and contract among persons, the scope and definition of international law has widened to cover, NGOs and even individual persons as well. The modern definition of international law is thus defined as a body of rules and principles that governs the relations among States, International Governmental

Organizations (IGO's), NGO's as well as individual persons in their relations among each other [10]. This definition of international law is mostly referred to as the modern definition as it expands the scope and focus of international law.

#### **1.4 Characteristics of International Law**

International law has certain specific and unique characteristics that distinguish it from the domestic law:

##### **Firstly the subject matter**

The primary subjects of international law are sovereign states [11], although in recent times some scholars argue that International Governmental Organizations, Non-Governmental Organizations, and even individuals could also be subject of international law. In a much broader sense, the assertion that IGOs, NGOs and individual persons are also subjects of international law is true due to the fact that the actions and activities of IGOs, NGOs and individual persons are regulated by international law and as such, they work within the larger framework of international laws and try not to infringe or breach any international law

##### **Secondly the source of international law**

There is no single or legally authorized source of international law as there exist in the case of domestic law. According to article 38 of the statute of the international court of justice, there are five sources of international law, namely: Treaties, Customs, General principles of law recognized by civilized States, Judicial decisions, Jurist work or Opinions of experts on international law. That is to say that unlike domestic law where the source could mostly be traced to one single, legally recognized institution or body which in most cases is the legislature of the country, international law does not possess this quality.

##### **Again, international law lacks strong enforcement machinery**

The enforcement mechanism backed by international law is not very strong as compared to that of domestic law. There is no universal policeman or institution at the international level that ensures compliance and enforces international law, unlike domestic law. Compliance with international law is a mutual consensus among member states and to a large

extent, the willingness to abide by such laws is as a result of the fact that, international law is believed to serve a good purpose for all.

##### **Furthermore, the law-making processes**

The process by which international laws are enacted is different from that of domestic law. One of the main and perhaps the most effective way of making international law is through treaties [12]. The basic elements of a treaty are: treaties are mostly formal written documents even though in some cases it can be unwritten, these formally written documents are signed and ratified by member states through a formal legal accepted and approved procedures, and final agreements made in the treaty are binding on member states: a concept known as "Pacta Sunt servanda"

## **2. METHODOLOGY**

The methodology adopted for the study is the qualitative approach. This is due to the fact the qualitative approach is much suitable for explanatory and descriptive studies [13]. Adopting this approach enabled the researcher to dwell on the works of renowned scholars in the field of international law that focus on debating whether international law is a real law or not. This helped in making a comprehensive analysis of the arguments surrounding this debate and eventually leading to an objective conclusion

The study primarily relied on secondary sources of information such as documents from the internet, journal articles, policy documents as well as all other important reading materials such as the dailies, press releases, news items and official reports.

The aim of the article is to contribute to the ongoing debate on whether international law is a real law or not and in order to make a comprehensive analysis of all the arguments surrounding this debate, the researcher placed the debate into the realist and liberal school of thought to which a conclusion was drawn after a critical analysis of the arguments presented by the realist and the liberal.

## **3. DISCUSSION ON WHETHER INTERNATIONAL LAW IS A REAL LAW?**

With a little background of what law is and what international law constitute, it will thus be interesting to attempt to answer the question

whether international law is really a law or not. To be able to comprehensively address this question, we shall look at the main arguments advanced by the two schools of thought that debate this question and for the purpose of this article; we shall situate the main arguments of the two schools of thought into the school of the Realist or Realism and the Liberals or Liberalism.

### **3.1 Realist/ Realism**

According to realism or the realist school of thought, international law is not really law. Thus the realist regards the domestic law as a real law, but international law, on the other hand, cannot be regarded or treated as a real law. The realist advances a number of arguments to support this assertion among which include:

#### **To begin with, this school of thought argues that National interest is paramount to every state**

According to the realist, states are the major players in the international system and states will never compromise their National interest for any international law. In other words, to the realist, if there is a clash between the National interest of a country and an international law, almost all states will choose their National interest above the International law without any hesitation. The argument being advanced by the realist here is that National interest is the driving force behind a country's foreign policy and as such states will only abide by an international law only when it is in accordance with their National interest, but in a situation where there is a conflict between a Country's National interest and international law, all countries are likely to choose their National interest above international law. In short, the realist believes that a real law should supersede all interest and compel compliance regardless of whether it is in one's interest or not, but since national interest supersedes international law in the relations of countries among themselves, then international law is not a real law.

#### **Secondly, international law lacks the coercive power that is backed by a real law as compared to that of domestic law**

To the realist, International law has a loose set of framework as compared to domestic law because it lacks the coercive power that is backed by a real law. This is to say that in the view of the realist, international law is not able to enforce and compel compliance as a domestic

law does. This is probably due to the fact that, there is no international "policeman" to enforce international law as in the case of domestic law where there is a recognized court and police to ensure compliance by all persons. A real law in the view of the realist should be backed by a coercive power that should force compliance by all individuals regardless of their status or power in the society, but international law in the view of the realist does not command such coercive force due to the reason that powerful countries always breach international laws and go unpunished.

#### **Again, the quest for power in international relation is important to every state**

According to the realist, countries will do anything to make themselves powerful rather than giving recognition to international law. All countries strive to outweigh one another in the international system and that is more important to states than submitting their quest for power to the recognition of any international law. Therefore, in the view of the realist, power is an important element in the international system and that explains the reason why countries will do everything within their possible means to be powerful because the more powerful you are as a country, the more influential you become in the international system and as such countries will not compromise their quest to be powerful for the recognition of any international law or convention. It is only when international law will aid a country in its quest for power that such a country will abide and give recognition to such laws, but in a situation where international law becomes a hindrance to a country's quest for power, that country will not give any recognition to that international law but will rather carry on with their actions and ambitions to be powerful and influential in the international arena.

#### **Furthermore, there is no legislature to enact international laws as in the case of domestic law**

The argument of the realist here is that a real law should have a recognized authority or institution to enact those laws, but in the case of international law, there is no universally accepted authority or institution vested with the power of enacting international laws and this does not make international law a real law. The absence of a legislature creates a vacuum in the process of making international law as it becomes unclear

where international laws are coming from and whether those who enact international laws have the full mandate and authority of all states to enact such laws as compared to domestic laws where there are full consent and authority vested in a recognized legislative body to enact the laws.

### **3.2 Liberalism/ Liberals**

According to the liberals, on the other hand, international law is a real law and this school of thought advance the following reasons to support their assertion:

**Firstly, this school of thought argues that all states to some extent give recognition to international law**

Almost all states in the world agree to some extent that, there exists some form of laws that govern the relations and activities of countries, NGOs, IGOs and individual persons in their dealings with one another. Thus, all the subjects of international law try to do their best to abide by these international laws. The argument of the liberals here is that, even though international law is frequently violated by some powerful states, it does not render international law invalid in its true sense because all states acknowledge the existence of the international law to some extent and try their possible best not to violate these laws. Even the powerful countries like the United States of America (USA), Russia, and China try to abide by these international laws and conventions. For example, in 2003, before the USA invaded Iraq, it went to the Security Council of the United Nations to seek for a resolution to permit the USA to go to war with Iraq to which the USA was refused even though it went ahead and invaded Iraq. The point, therefore, is that the USA as a world's superpower could have simply gone to Iraq without going to the UN in the first place, but the fact that the USA went to seek approval which was not granted confirms the fact that even powerful countries give recognition to international law and tries their best to comply with them. Again, after the USA invaded Iraq, there have been several occasions where the USA has been criticized of breaching International law by some scholars and the USA in most cases also tries to respond to such criticisms and justify its actions. The point, here again, is that a country like the USA could decide not give any response to any criticism by any writer or scholar, but the fact that the USA comes out to defend its stand against the breach of

International law goes a long way to support the fact that even powerful countries give recognition to international law and tries not to breach these laws which in the argument of the Liberals makes international law a real law.

**Secondly, one of the elements of law is that those who breach it are punished**

The liberals believe that international law, possesses the element of punishing those who breach it. We have seen several situations where Countries or people who have breached international laws and conventions are punished in one way or the other. The Liberals will accept the fact that, there are some situations where international law has been breached, but the offenders get away with the act without being punished but this is only on some few occasions. According to Roger Fisher, even in the domestic setting, not all the laws are enforceable as there are powerful individuals who breach the law in one way or the other and still have their way around the law without being punished [14]. For instance, if a private individual or party wins a case against the State in court, the state in this case decides to abide by the ruling of the court only because it wants to do so and the state can decide to act according to the ruling of the court only when it deems fit because the private individual cannot put a gun on the head of the state to act immediately. In most cases, however, those who violate international laws are being tried and if they are found guilty, they are being punished to serve as a lesson or deterrent to other states. Not only are individuals of a country punished for breaching international laws and conventions, but even economic sanctions are sometimes imposed on a whole country or state to ensure compliance or as a way of punishing those countries that breach international laws and conventions.

**Additionally, the general assembly and the security council serve as the parliamentary body of international law**

According to the Liberals, there are institutions like the General Assembly and the Security Council of the UN who perform similar functions as the legislative body of any given country in domestic law. These institutions could thus be equated to the legislature in the domestic setting as they perform the same function of the legislature in any given country. These institutions ensure that the enactment of conventions and treaties passes through the due

process of deliberation and discussion before being accepted or endorsed. One can even argue that at the international level, treaties and conventions are enacted by global experts who make quality inputs as compared to the legislature of some countries which just rubber stamp rules in the favour of their party.

Lastly, the liberals argue that, the peace and relative stability that has been achieved in the international arena is a result of the fact that there exist some laws that governs and regulate behavior of States, NGOs, IGOs etc in their relations with one another and that without such laws, there will be no way by which such peace and understating in the relation among States with respect to their interaction with one another could be achieved and that confirms the fact that international law is real law. International law has governed the way countries or states should trade among themselves to ensure peaceful coexistence and harmony and as such, there is no justification that international law is not a real law as argued by the realist.

### **3.3 Justification of international law as a real law**

The most advanced argument used by scholars who are of the view that international law is not a real law is the enforcement argument. Thus, international law is mostly criticized on the basis that it cannot be enforced to the fullest as in the case of domestic law.

This assertion to a large extent is debatable and in fact, not true in all situations because even the domestic law cannot be fully enforced at all times. For example, in the domestic setting, if an individual wins a case against the state, the individual is at the mercy of the state to comply with the ruling because the individual cannot hold a gun to the head of the state in order to compel the state to comply with the court's ruling. Thus, it can be argued that in the domestic setting, states abide by the rulings of domestic court mostly to protect their image or reputation at the international level as a law-abiding state that ensures the rule of law or probably because they just want to do so due to the fact that in the actual sense nobody can compel a state to abide by a domestic court decision.

Moreover, international law to a large extent is enforceable in the international system and there are many cases where powerful countries like the USA, China, Russia, etc. have been

sanctioned for breaching some international laws for which these countries have complied and acted according to the rulings of international tribunals.

For example, in 2014, the European Union imposed economic sanctions against Russia, targeting its oil industry, defense, dual-use goods and sensitive technologies. This sanction was a result of the fact that Russia was accused of supplying air missile to Ukrainian separatist, which was used in the shooting down of Malaysia Airlines flight MH17 over eastern Ukraine and this act was considered as a breach of international law [15]. Again in July 2014, Russia was again found guilty of breaching international law and as a result was made to pay a compensation of \$50bn (£29.4bn) to shareholders of Yukos, the former defunct oil company that was broken up a decade ago after its boss fell foul of Vladimir Putin [16]. In the judgment, a tribunal in the Hague ruled that the Russian state had intentionally sought to bankrupt Yukos, confiscate its assets and use all measures possible to prevent the owner of the company who is in the person of, Mikhail Khodorkovsky, from entering into politics

Additionally, on the 3<sup>rd</sup> of July 1998, a USA Navy ship called the Vincennes shot down the Iran Air Flight 655 killing all the 290 members and the crew on board [17]. This was a terrible incident and was considered a breach of international law. In fact, Iran sued the United States in the International Court of Justice in The Hague to seek compensation for Iranian families that lost their loved ones as a result of this act and in the lawsuit, Iran argued that the United States had violated the 1971 treaty which sought to prevent acts of violence against civilian airliners. After the ruling of the court, the USA agreed to pay a compensation of \$100,000 to \$250,000 to the families of people killed when the Iran Air Flight 655 was shot down by the American Navy Ship [18].

Finally, in the late part of 2015, China arrested and jailed three Christian church leaders Hu Shigen, Zhou Shifeng and Xie Yang without fair trial and this action was seen as a violation of the rights of these people as stated in international law and as such the United Nations in the year 2017 demanded that the Chinese government should immediately release these people and pay them the necessary compensations. This case was reviewed by the UN's working group on arbitrary detention, and upon careful analysis,

the group rejected the claim by the Chinese government and said that the detentions of these people were “made in total or partial non-observance of the international norms relating to the right to a fair trial” [19]. Even though the decision of the UN’s working group on arbitrary detention is not legally binding on China, the Chinese government complied with the ruling and acted accordingly.

The above mentioned are just a few of the many cases where powerful countries in the world have been sanctioned for breaching international laws to which these countries have complied and acted according to the ruling of an international tribunal. It is, however an undisputed fact that, in some situations, powerful countries or states have breached one international law or the other without being punished or in some cases refuses to abide by the rulings of international tribunals but comparatively, the number of times states abide and give recognition to international law is much higher than the number of times they breach international law without being punished.

#### **4. CONCLUSION**

In conclusion, I will like to state that, the two schools of thought have all made good points to justify their stand with regards to debating whether international law is real law or not and this debate will continue to exist partly due to the fact that there is no universally accepted definition of what law is and as such one’s judgement on whether international law is real law or not will be influenced by what the individual thinks and believe constitute the definition of law.

This notwithstanding, however, international law to a large extent is a real law because in every situation, there are exceptions and the exceptions should not be used to generalize on the issue. This is to say that in the general sense all States, NGOs and even individual persons give recognition to the existence of international law and the fact that there exist exceptional situations where some few powerful countries have breached one international law or the other without being punished cannot invalidate the international law. Also, even domestic law in some situations does not possess hundred percent coercive force because in the domestic settings there are some powerful individuals that breach or violate the law and go unpunished, but such exceptions cannot be used to generalize that domestic law is not a real law.

In some occasions, States or individuals may break the law for their selfish interest or desires, but that is not to say that there exists no law in the first place. States to a large extent do comply with international law for lots of reasons such as reputational reasons, reciprocity reasons, market reasons and so on. Thus, states will like their nationals in foreign countries to be treated well and as such, they mostly ensure that other foreign nationals are treated well in their territory. Additionally, a state that is tagged for constantly breaking international laws and not respecting foreign investors will in turn not attract any more foreign direct investments and will be stuck economically. For these reasons and others, states comply with international laws and obey them, making international laws real laws that can be enforced.

Also, the sources of domestic law and international law are different and as such the two laws cannot be compared.

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Author has declared that no competing interests exist.

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