

## WHAT IS INTERNATIONAL LAW?\*

*Ketevan Khutsishvili*

*The truth is that international law is  
neither a myth on the one hand, nor a panacea on the other,  
but just one institution among others  
which we can use for the building of a better international order.<sup>1</sup>*

### ABSTRACT

One will often find statements by specialists of a variety of branches of domestic law in Georgia arguing that there is no international law. Others will consider international law to be part, for example, of the public law branch of domestic law. The Founder of the International Law School in Georgia, Academician Levan Alexidze has laid a solid foundation for enlightening lawyers in Georgia on the peculiarities of International Law, this independent legal system that undoubtedly and definitively exists. This article is a brief account of the importance International Law has for the international community and for the formation of domestic legal systems.

### INTRODUCTION

As I began my studies at the International Law and International Relations Faculty at Tbilisi State University in the 1990-ies, legendary Professor Levan Alexidze was the leading professional and academic authority and great humanist, who was highly respected in Academia, the Office of the President, Parliament, the State Chancellery and international organizations - still very few at that time - represented in Georgia. I remember the astonishment of the freshmen, including myself, when on the very first day at the University - on 1 September - our legendary Professor Levan Alexidze took us, the new entrants to the Parliament of Georgia. Zurab Zhvania, then Chairperson of the Parliament of Georgia<sup>2</sup> and Prof. Dr. Levan Alexidze, also Chief Adviser to the President of Georgia on International Legal Matters, greeted us and made an unforgettable impression on all of us. This was happening in the post-Soviet Georgia, the legislation of which still provided for capital punishment. Newly independent Georgia was neither a member of the Council of Europe nor of OSCE. The Speaker of the Parliament and the Chief Adviser to the President of Georgia described in a splendid manner what International Law meant for the newly independent Georgia, which was striving for recognition of its independence by the world community and for membership in important international organizations to ensure Georgia's full exercise of its sovereign authority in the international arena.

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\*The article was drafted in English, translated into Georgian.

<sup>1</sup> J. Brierly, *The Law of Nations*, 5th Edn, Oxford, 1955, Preface, seen in: Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2007), 1.

<sup>2</sup> Zurab Zhvania, then Prime Minister of Georgia, is the author of the words "I am Georgian and therefore I am European", addressing the Parliamentary Assembly of the Council of Europe in 1999, as Georgia's membership to the Council of Europe was unanimously supported.

For someone, who had just turned 17, this was a groundbreaking start of what appeared to be an absolutely amazing profession, which since then I have mastered and practiced in Georgia and outside of Georgia, as well as physically working in Georgia but within a supranational international organization.

Since my amazing first day at the University and the Parliament of Georgia, I have witnessed the following paradox many times: Georgia, while steadily gaining its place within the international community, has a considerable number of lawyers specializing in different branches of domestic law, who either claim that: a) International Law does not exist; or b) International Law is a part of some other branch of law, e.g. of public law. Academician Levan Alexidze always eloquently disproved such statements which sometimes were made due to the lack of information on the part of those who claimed that International Law, as law, did not exist, or based on the misleading perceptions of those, who again because of lack of professional information had difficulty to acknowledge that International Law was an independent legal system. Now, as I am in charge of the *Levan Alexidze Journal of International Law*, unfortunately without Levan Alexidze next to me in this world, I dedicate this article to the founder of Georgia's International Law School and want to shed light once more on the myths of the non-existence, or lack of independent existence, of the legal system called International Law.

This article is therefore a succinct account of elements demonstrating that international law not only exists, but is an independent legal system, alongside domestic legal systems, and established as law based on an agreement between legally equal State actors. While this concise paper will be read by many who fully agree with the above, the paper is meant to be for those who are doubtful about any of the above listed elements. To that end, some basics will be explicitly addressed in this brief account, to elucidate these elements with as much clarity as possible and in providing perspectives going beyond the system of domestic law.

#### **CHAPTER I: DOES INTERNATIONAL LAW EXIST?**

Professor Levan Alexidze used to say, and I repeat it when explaining to my first or second grade students, that if we have a telecommunication system, use air communications, receive mail, enjoy all of this and many nitty-gritty as well as many important things in our daily life, it is all thanks to an independent legal system called International Law. Why? Because all of this is based on international agreements which "subjects" of international law have concluded and use in relations with each other.

I then usually get a question, particularly from the students who have studied theories of international relations. The question is roughly the following: but, since powerful nations can either change international law as they see fit or not observe the regulations established by it, is international law also for small states like Georgia? This question luckily comes usually in the beginning of the term, before we cover a variety of subjects of public international law, following the path established

by Professor Levan Alexidze and concisely, yet in a very comprehensible manner for freshmen, formulated in his book “Contemporary International Law”.<sup>3</sup> As Martti Koskenniemi in the preface to the reissue of his book “From Apology to Utopia” suggests, “While the way international law is spoken, and thus applied, reflects the profoundly inequitable constellation of power today, it also offers avenues of resistance and experimentation. It may be used to support and to challenge hegemony. ... suggestions to “do away” with international law seem to me both naïve and ideological, they are naïve because every aspect of the international world is always already “legalized”, that is amenable for description and analysis by reference to legal concepts and categories.”<sup>4</sup> I hardly recall a case when by the end of the course called Public International Law students who have thoroughly studied the subject would not state that, actually, International Law is exactly for small states, as it provides for the opportunity to enter into relations with other states on an equal footing.

Specialists of domestic legal systems may hold the view that international law does not exist because of its lack of a clear system of enforcement characteristics compared to domestic law, or that it is rather a means at the disposal of the mighty players in the international arena who define its agenda and fate. Well, if we again turn to Martti Koskenniemi, “[if] ... every law is a “politics”, it is likewise true that every politics can become known, and effective, only as “law”, including above all a law that liberates some actors to decide in accordance with their preferences. The question is never whether or not to go by law but by which law or whose law.”<sup>5</sup> As Georgia regained independence, Academician Levan Alexidze founded the International Law School of Georgia. While playing a crucial role in restoring the sovereignty of Georgia, and in creating the legal framework for the statehood of contemporary Georgia, he simultaneously, and immediately after the collapse of the Soviet Union, made it possible for lawyers to learn and research International Law in Georgia. With his invaluable experience acquired both domestically and internationally, he was laying the legal foundation to making Georgia a member state of the United Nations, the Council of Europe, the Organization for Security and Co-operation in Europe, etc.

For this to happen, Georgia needed to show compliance with the law. Which law would be used to compare Georgia’s domestic legal system with? Would it be required from Georgia to have better laws than any other state, for example, in the Romano-Germanic legal system? Or would Georgia’s law be assessed against any of the newly independent states, all striving to join the international community of states as equal members of the world community? Certainly not. The law that had to be used was

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<sup>3</sup> Levan Alexidze, *Contemporary International Law* (renewed and supplemented edition), edited by Prof. Dr. Ketevan Khutsishvili, Professor of International Law (Tbilisi: Iuristebis samkaro, 2014).

<sup>4</sup> Martti Koskenniemi, *From Apology to Utopia* (Cambridge: Cambridge University Press, 2009), xiv.

<sup>5</sup> Martti Koskenniemi, *From Apology to Utopia* (Cambridge: Cambridge University Press, 2009), xiv.

simply called International Law. Here we shall note that in some cases Georgia had to comply with “universal” International Law, in some other cases with “regional” International Law.<sup>6</sup> The latter was of particular relevance, as on 14 July, 1996 Georgia declared its intention to join the Council of Europe<sup>7</sup> - one of the most important international organizations not only for strictly inter-state relations but also for “securing to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention”<sup>8</sup>. One comes quite frequently across lawyers specializing in domestic law, who cite the European Court of Human Rights, often referred to as “the Strasbourg Court”, as threatening domestic actors and institutions, when they are discontent with the domestic legal system of a country or its application. Without going into details, this is only possible because on 27 April 1999, Georgia became the 41<sup>st</sup> member state of the Council of Europe<sup>9</sup>, with equal rights and duties and aligned its legislation with the requirements of (regional) International Law.

Citing J.G. Starke, QC may also be helpful: ...“breaches of international law resulting in wars ... and the inability of international law to cope with such endemic problems as disarmament, international terrorism and trafficking in conventional arms tend to receive adverse attention, and from them the public incorrectly deduces the complete breakdown of international law. ... It is possible to argue further that in municipal law (that is, state law), breaches, disturbances and crimes take place, but no one denies the existence of law to which all citizens are subject. Similarly, the recurrence of war and armed conflicts between states does not necessarily involve the conclusion that international law is non-existent.”<sup>10</sup>

As Georgia strives to further enhance its international standing and advance in getting closer to other international organizations, such as the North Atlantic Treaty Organization (NATO) and the European Union (EU), the introduction and implementation of the corresponding legal basis that Georgia shall comply with is high on its agenda. If it is Georgia’s sovereign intention to become a fully-fledged member of the wider international community, and there are certain legal standards to be advanced in Georgia to that end, there is no other law, but international law, that may be considered as applicable and with which to compare Georgia’s legal basis and practices.

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<sup>6</sup> For details see: Levan Alexidze, *Contemporary International Law* (renewed and supplemented edition), edited by Prof. Dr. Ketevan Khutsishvili, Professor of International Law (Tbilisi: Iuristebis samkaro, 2014), 12.

<sup>7</sup> See: Parliamentary Assembly, Opinion 209 (27 January, 1999) Georgia’s application for membership of the Council of Europe: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16669> (accessed: 10.10.2019).

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI.1950, Article 1: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf%23page=9](https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9) (accessed: 30.10.2019).

<sup>9</sup> See: <https://www.coe.int/en/web/portal/georgia> (accessed: 30.10.2019).

<sup>10</sup> J.G. Starke QC, *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 17.

## CHAPTER II: IS INTERNATIONAL LAW REALLY LAW?

International Law uses universally recognized general principles<sup>11</sup> and numerous distinct sources<sup>12</sup>. Charles G. Fenwick, in his book “International Law”, almost a century ago claimed that “international law is a law governing the relations of states. It defines the rights possessed by states and prescribes the duties corresponding to those rights. The rules of conduct that it lays down apply primarily to the collective group recognized in international law as having the juristic character of a state. On the other hand, each separate state possesses its own municipal law, emanating from the sovereign authority of the state and prescribing rules for the organization and functions of the government of the state ...”<sup>13</sup>

It is appropriate to highlight here the approach taken by decisionmakers in Georgia in the process of formulating the legal basis for Georgia as it regained its independence following the collapse of the Soviet Union: “In the beginning of April 1991, President of the Republic of Georgia Zviad Gamsakhurdia tasked a member of the Supreme Council of Georgia, Levan Alexidze, and the then Minister of Justice Joni Khetsuriani to draft an act based on the results of the Referendum of 31 March, 1991, which would reflect the vigorous and cohesive will of the population of Georgia regarding the indispensability of the restoration of the independence of the country. *The Act on the Restoration of the Independent Statehood of Georgia* encompassed many highly important international legal provisions, including the recognition of the concept of the primacy of International Law in Georgia having supreme legal authority, as considered and reflected in publications by Levan Alexidze throughout the past decades. According to the Act, the primacy of International Law over the laws of the Republic of Georgia was pronounced as one of the main Constitutional principles of the Republic of Georgia. This was later developed in Articles 6 and 7 of the 1995 Constitution of Georgia.”<sup>14</sup> After subsequent revisions of the Constitution of Georgia, its current Article 4, paragraph 5, states as follows: “The legislation of Georgia shall comply with the universally recognized principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia.”<sup>15</sup>

<sup>11</sup> For details see: Levan Alexidze, *Contemporary International Law* (renewed and supplemented edition), edited by Prof. Dr. Ketevan Khutsishvili, Professor of International Law (Tbilisi: Iuristebis samkaro, 2014), 41-75.

<sup>12</sup> For details see: Samantha Besson, Jean D’Aspremont, et al, *The Oxford Handbook of the Sources of International Law*, (Oxford: Oxford Scholarly Authorities on International Law, 2017), 1-202, 279-322.

<sup>13</sup> Charles G. Fenwick, *International Law* (New York, London: D. Appleton-Century Company Incorporated, 1934), 75.

<sup>14</sup> Levan Alexidze, *International Law and Georgia, from Antiquity to Present: Selected Papers Published in 1957-2012*. Edited by Ketevan Khutsishvili (Tbilisi: Tbilisi State University, 2012), From the Editor: 18-19. See also: Oxford Bibliographies: <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0100.xml#firstMatch> (accessed: 19.11.2019).

<sup>15</sup> Constitution of Georgia, Article 4, paragraph 5. 24 August 1995 No 786-რს. <http://www.>

This body of law that Georgian domestic legislation shall comply with, is generated from its own sources. Those sources are found in a Statute of the International Court of Justice, which some refer to as “the World Court”, one of the six principle organs of the United Nations<sup>16</sup>. The following sources of law are listed as constituting sources of International Law: ...“international conventions, whether general or particular, establishing rules expressly recognized by the ... states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”<sup>17</sup>

These - absolutely legal - sources of International Law may be at times different from the types of sources of law used by a domestic body of law. The ensuing difficulty for lawyers specializing in domestic law may be particularly noticeable in countries with the Romano-Germanic legal system which is based mostly on written law and less on case law. However, this does not deprive International Law of its characteristics of being “law”.

Another element, possibly causing confusion or supporting the arguments of those who do not acknowledge International Law as actually being a law, is again the absence of a central enforcement authority in International Law. Since those practicing domestic law are used to rigidly defined mechanisms of enforcement which nevertheless are often insufficiently defined or selectively established and/or used in domestic legal settings, the argument may be made by them that without such enforcement mechanisms International Law may not be law. “Enforcement is a fundamental challenge for international law”.<sup>18</sup> However, as Rosalyn Higgins QC aptly notes: “there are very few today who believe that international law cannot exist in the absence of effective sanctions, or that sanctions predicate the existence of particular norms of international law.”<sup>19</sup>

As Anthony Aust notes, “whereas everyday newspapers report crimes, it is usually only when a flagrant breach of international law occurs that the media take notice of international law. This can give a distorted impression of the nature of international law. International law has no ready sanction for its breach. Because there is no international police force or army that can immediately step in, international law is often perceived as not really law. Yet the record of even the most developed domestic

[parliament.ge/en/ajax/downloadFile/131642/constitution-of-georgia](https://parliament.ge/en/ajax/downloadFile/131642/constitution-of-georgia) (accessed: 19.10.2019).

<sup>16</sup> Charter of the United Nations, signed on 26.06.1945, entry into force: 24.10.1945, Article 7, paragraph 1, also: Chapter XIV: <https://www.un.org/en/sections/un-charter/chapter-iii/index.html>.

<sup>17</sup> Statute of the International Court of Justice, Article 38, paragraph 1: <https://www.icj-cij.org/en/statute> (accessed: 01.10.2019).

<sup>18</sup> Bradford Anu, Ben-Shahar Omri, Efficient Enforcement in International Law (Chicago Journal of International Law, Vol. 12, N 2, Winter, 2012, 375), 375.

<sup>19</sup> Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford: Oxford Scholarly Authorities on International Law, 1995), 16.

legal systems in dealing with crime does not bear scrutiny.”<sup>20</sup>

Fenwick, furthermore, argues that “... it is clear that international law is binding *per se* upon all the agencies of government within the state, and no act of the national legislature or decree of the executive or judicial agencies can change the force of its provisions in so far as the legal relations of the state toward other states are concerned.”<sup>21</sup>

When the Russian Federation proceeded to massive arrests, detentions and expulsions of Georgian nationals starting late September 2006 until the end of January 2007, Georgia resorted to International Law and applied to the European Court of Human Rights, launching an inter-state case against the Russian Federation.<sup>22</sup> If International Law was not law, how was it possible that the European Court of Human Rights held that the expulsion of Georgian nationals *en masse*, their arbitrary arrests and detentions, inhuman and degrading conditions of detention and other violations<sup>23</sup> did actually occur in the jurisdiction of the Russian Federation? It is clear that a) international law, as law, was used and b) this law was used by a small nation against one of the biggest powers of the world; c) the outcome was positive for a small nation, Georgia, which resorted to the only law at its disposal in the situation.

In the immediate aftermath of the 2008 war, Georgia brought to the attention of the International Criminal Court the international armed conflict that occurred in Georgia in August 2008. The International Criminal Court announced a preliminary examination of the situation in Georgia on 14 August 2008.<sup>24</sup> Yet again, what was the legal basis for the International Criminal Court to deal with criminal responsibility for the commission of international crimes, other than law? This law is called International Law.

### CHAPTER III: IS INTERNATIONAL LAW AN INDEPENDENT LEGAL SYSTEM?

Martin Dixon notes that “for any of international law ... to be fully understood, it is important for the underlying assumptions to be made clear. This is particularly necessary with international law, as it is not of the same nature as national law, and so many of the assumptions as to who is subject to international law and as to the acceptance of international law as “law” must be analyzed before the substance of international law itself can be determined.”<sup>25</sup>

<sup>20</sup> Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2007), 3.

<sup>21</sup> Charles G. Fenwick, *International Law* (New York, London: D. Appleton-Century Company Incorporated, 1934), 77.

<sup>22</sup> 13255/07, *Georgia v Russia (I)*, Judgement of 03/07/2014, Final of Grand Chamber 31/01/2019.

<sup>23</sup> See: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680972e1b](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680972e1b) (accessed: 20/11/2019).

<sup>24</sup> The Office of the Prosecutor, International Criminal Court, Report on Preliminary Examination activities, 13 December 2011, p. 18.

<sup>25</sup> Martin Dixon, Robert McCorquodale, *Cases and Materials on International Law* (Blackstone

Contrary to the above, in his book “General Part of Civil Law” Professor Lado Chanturia argues as follows: “relations based on equality of arms may emerge in public law too, in particular by means of an agreement. For example, classical international law (which is a part of public law) originally was formed as a law of equals.”<sup>26</sup>

Columbia University Professor Louis Henkin tries to shed light on the nature of international law stating that “to appreciate the character of international law and its relation to the international political system, it is helpful to invoke (though with caution) domestic law as an analogue. Domestic (national) law ... is an expression of a domestic political system in a domestic (national) society ... Similarly, ... international law is the product of its particular “society” [and] its political system. International law, too, is a construct of norms, standards, principles, institutions and procedures. ... But the constituency of the international society is different.”<sup>27</sup>

If we revert to yet another author, trying to define what international law is, this will be the answer found: “International law is different from other law such as domestic law and conflict of laws (or private international law). ... and domestic laws of any country cannot tell us what international laws are.”<sup>28</sup>

“It is clear that International law is of a different nature to national law. If this is kept in mind, then the events, which have significance in international law as well as the study of international law, will be better analyzed and appreciated.”<sup>29</sup>

“This is why it is very important to treat international law as a system of principles and rules that one can find in the formal sources of international law as recognized by the world community of states.”<sup>30</sup> “An essential element of the definition of international law, therefore, is ... that it is law that is made by states collectively. No single state acting unilaterally can make international law. ... In other words, the authority to make international law rests with states acting together. ... there are no predetermined limits as to what areas international law does or should regulate. This can only be determined through collective agreement amongst states.”<sup>31</sup>

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Print Limited, 1991), 7.

<sup>26</sup> Lado Chanturia, *General Part of Civil Law* (Tbilisi, 2011), 11.

<sup>27</sup> William Slomanson, *Fundamental Perspectives on International Law*, Sixth Edition (Wadsworth CENGAGE Learning, 2011), 3.

<sup>28</sup> Başak Çali (ed.) *International Law for International Relations* (Oxford: Oxford University Press, 2010), 5.

<sup>29</sup> Martin Dixon, Robert McCorquodale, *Cases and Materials on International Law* (Blackstone Print Limited, 1991), 12.

<sup>30</sup> R. Mullerson, *Sources of International Law: New Tendencies in Soviet Thinking* (1989) 83 *AJIL* 494, at pp.498-499, seen in: Martin Dixon, Robert McCorquodale, *Cases and Materials on International Law* (Blackstone Print Limited, 1991), 9.

<sup>31</sup> Başak Çali (ed.) *International Law for International Relations* (Oxford: Oxford University Press, 2010), 6-7.



Professor Alexidze states that “... international law, just like domestic law, is an independent legal system. However, this certainly does not mean that there is an abyss between the two and these are isolated legal constructs. On the contrary, the more international economic, political, cultural and other relations develop and get tighter, the more effective and powerful becomes the impact of the two legal systems on each other.”<sup>32</sup> The same idea is developed by Andrea Bianchi, when stating: “... domestic law has been a necessary complement to international law, if not its unspoken premise.”<sup>33</sup>

As Anthony Aust notes, “whatever the connections international law has with other systems of law, it is clearly distinguished by the fact that it is not the product of any national legal system, but of the states (now over 190) that make up our world.”<sup>34</sup>

## CONCLUSIONS

Before concluding this brief account of the basics of international law, it might be helpful to recall the very fact that the term “international law” was coined by Jeremy Bentham<sup>35</sup> on which Nussbaum has an interesting comment: “Bentham invented the term “International law” in one of his happiest linguistic innovations, in his *Introduction to the Principles of Morals and Legislation* (1789). It is especially felicitous because it leads itself easily to derivatives. Perhaps something like “interstatal” would have been more exact but...”<sup>36</sup>

As Anthony Aust notes, “... when the media is full of stories questioning the lawfulness of a state’s actions, some domestic lawyers rush to express their opinions, usually critical. They are not always wrong, but usually display a lack of familiarity with international law, apparently believing that the reading of a textbook or an (apparently simple) instrument like the UN Charter is enough. The fact that some textbooks are lucid and make international law accessible, does not mean that a domestic lawyer, however eminent, can become an expert on it overnight. The difficulties that the judges of the House of Lords... had in grappling with international law in the Pinochet case, despite having been addressed by several international law experts, are amply demonstrated by their differing separate opinions.”<sup>37</sup>

As aptly noted by Dixon, “international law has effects on, and is affected by, international relations, political thought and communications, as well as by the awareness of women and men in every state that they are a part of as those addressed

<sup>32</sup> Levan Alexidze, *Contemporary International Law* (renewed and supplemented edition), edited by Prof. Dr. Ketevan Khutsishvili, Professor of International Law (Tbilisi: Iuristebis samkaro, 2014), 30.

<sup>33</sup> Andrea Bianchi, *International Law Theories* (Oxford: Oxford University Press, 2016), 47.

<sup>34</sup> Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2007), 2.

<sup>35</sup> English philosopher (1748-1832).

<sup>36</sup> Nussbaum, *A Concise History of the Law of Nations* (Revised ed.), 136, seen in: John P. Grant, J. Craig Barker (eds.) *Parry and Grant Encyclopedic Dictionary of International Law*, Second Edition (Dobbs Ferry, New York: Oceana Publications, Inc., 2004), 251.

<sup>37</sup> Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2007), 5.

by the United Nations Charter as being ‘We, the Peoples of the United Nations’.<sup>38</sup> If international treaties are concluded and used by small nations including Georgia, the same way as by big ones, Georgia’s legal system and domestic practices are measured only against the standards established by international law.

Yes, International Law does exist – definitively and unquestionably. It is recognized as law by lawyers around the world, including those practicing predominantly domestic law. It is a legal system that is independent of any domestic legal system.

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<sup>38</sup> Martin Dixon, Robert McCorquodale, *Cases and Materials on International Law* (Blackstone Print Limited, 1991), 1.