CHAPTER ONE

THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND STATE BEHAVIOUR IN INTERNATIONAL CRISIS INVOLVING THE THREAT OR USE OF FORCE

When viewing a painting there are a number of positions from which to view it. Stand close to it and you can perceive the details of the brushstrokes used in creating the painting. Stand a bit further back and you lose the detail of the brushstrokes but gain a more vivid sense of the colour. Stand even further back and you can perceive the totality of the work: the way brushstroke, colour, and form combine to convey an idea through images. How the painting is viewed – whether as brushstrokes, colour, or total image – depends on the positioning or perspective one adopts. Moreover, while brushstroke and colour may indeed help illuminate how we interpret a painting, it is only through viewing the totality of the work that a superior appreciation of the painting can be achieved. Likewise, how the theoretical picture of the relationship between international law and State behaviour is perceived depends in large measure on where one stands in terms of the theoretical perspective by which to perceive the picture. Existing theoretical perspectives have helped to illuminate aspects of the relationship between international law and State behaviour, but few have been able to adequately account for the totality of the picture. While existing perspectives are useful, it is also necessary to be able to appreciate the totality of the relationship between international law and State behaviour. The aim of this chapter is to chart where others have stood in relation to the international law-State behaviour picture.

The Relationship Between International Law and State Behaviour in International Crises Involving the Threat and/or the Use of Force: More Than Compliance or Justification?

Peruse the official pronouncements of governments as represented by the statements of their foreign ministers, formal statements in multinational forums, press releases,
even government websites, and you will see extensive reference to international law. Governments invest much time, energy and political capital to present international legal arguments in support of their foreign policy behaviour in a wide range of areas of international relations, such as trade, the environment, human rights, the use of military force by one country against another country, and so on.

The area of State behaviour capturing the biggest headlines and the most attention among specialists and novices alike, is that of the use of force. States that use force (or aim to do so) undertake intense public diplomacy. Part of the process of public diplomacy involves reference to legal argument in support of a State's preferred action and in condemnation of one's rival's action. Both the initiator and subject of threats and/or use of force engage in intense diplomacy to demonstrate how their positions are consistent with international law. Such behaviour seems at odds with the popular picture of international law as a ‘toothless tiger’, of little significance to the conduct of international politics. Where important considerations of national interest are concerned, as in times of war, law is absent. From this perspective, international law can at best only serve as a justification for State behaviour; an ‘apology’ for State behaviour taken on other, political, grounds. Such a picture can be contrasted with another popular, yet contradictory, picture that suggests that law, if complied with, can be a vehicle for world peace and cooperation. This ‘utopian’ picture of the influence of international law on State behaviour assumes that faithfulness to the rules of international law could be a basis for peaceful relations among States.¹

The popular picture of international law as a ‘toothless tiger’ is premised on an assumption that national self-interest takes precedence over the rules of international law. International crises involving the use of force would appear to be the most obvious example of national interests taking precedence over considerations of international law in the determination of State behaviour. Military action to protect the security (and possibly the very survival) of the State takes precedence over what the rules of international law may or may not allow. It would therefore be expected that the influence of international law on State behaviour – the process of foreign policy decision-making and public rhetoric – would reside in its capacity to legitimate behaviour determined on the basis of geopolitical and military considerations as opposed to any intrinsic capacity international law may itself possess. According to such an understanding of the influence of international law on State behaviour, references by US representatives to a Security Council resolution recommending the use of military force to support the defense of South Korea against North Korea during the 1950 Korean War was a justification, worked out once the main issues of US national interest had been addressed. Yet how can we account for instances in which States act according to international law contrary to perceived national interests? For instance, during the Korean War, the US in certain instances held back

¹ The terms ‘apology’ and ‘utopia’ are borrowed from Martti Koskenniemi From Apology to Utopia: The Structure of International Legal Argument (Finnish Lawyers’ Publishing Company: Helsinki 1989).