

The nature of international law and the international system

- International law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law. It operates alongside international diplomacy, politics and economics.
- The most cogent argument for the existence of international law as a system of law is that members of the international community recognise that there exists a body of rules binding upon them as law. States believe international law exists. This acceptance of the reality of international law by the very persons to whom it is addressed exposes the weakness of those who argue that international law does not exist.
- While international law has never been wholly dependent on a system of institutionalized enforcement, the absence of a 'police force' or compulsory court of general competence does not mean that international law is impotent.
- There is no doubt that a very important practical reason for the effectiveness of international law is that it is based on common self-interest and necessity. Today, international society is more interdependent than ever and the volume of inter-state activity continues to grow. International law is needed in order to ensure a stable and orderly international society.
- It would be a mistake to conclude that international law is a perfect system. There is much that could be reformed and enhanced. There is a general lack of institutions; the content of the rules of international law can be uncertain; states may elect to ignore international law when their vital interests are at stake; states are able to violate basic rules, such as the prohibition of violence without fear of being coerced.
- The juridical force of international law does not derive from a traditional conception of law, nor is it based on consent, or derived from natural law. Its force comes from the fact that it is needed to ensure that international society operates efficiently and safely. 'Law' is the hallmark of any political community and is necessary for the society to function and, because it is necessary, it is *ex hypothesi* binding.

The sources of international law

- The traditional starting-point for a discussion of the sources of international law is Art. 38 of the Statute of the International Court of Justice.
- International treaties – International treaties are the only way states can create international law consciously. Treaties may be bilateral (between two states) or multilateral (between many) and usually they are the outcome of long and difficult negotiations. Treaties only bind states that become parties, but treaties may promote the development of customary law.
- Customary international law – Customary international law is that law which has evolved from the practice or customs of states. It is the foundation stone of the modern law of nations. Customary law is derived from general, uniform and consistent state practice, together with a belief that the practice is obligatory (*opinio juris*). Generally, a treaty may modify or replace customary law, but there are some

fundamental rules of customary law (rules of *jus cogens*) that may not be changed by treaty.

- General principles of law – This may comprise law from a number of sources: natural law doctrines; rules common to all legal systems; principles of equity; general principles of international law.
- Judicial decisions – Judicial decisions are said to be a ‘subsidiary means’ for the determination of law, although in practice such decisions play a much more direct role in clarifying the sources of law. They include decisions of the International Court of Justice; decisions of other international tribunals such as the International Criminal Court, the Permanent Court of Arbitration and the International Tribunal for the Law of the Sea; decisions of national courts on questions of international law.
- The writings of publicists – These provide support for the other sources of international law and may provide clarification in cases of doubt. They are certainly subsidiary.
- Resolutions of international organizations – These are omitted from Art. 38 of the ICJ Statute but they can play a significant role in the elucidation of customary law, the development of customary law, the identification of *opinio juris* and in settling matters relating to the constitution of the organization. They include resolutions of the Security Council and General Assembly of the United Nations, and may include resolutions of regional organizations.

The law of treaties

- The law of treaties covers a wide variety of matters. There are rules dealing with entry into force, termination, interpretation, reservations (being exceptions to specific obligations in a treaty) and the relationship of treaty law to custom. The law of treaties is one of the least ‘political’ areas of international law.
- A ‘treaty’ can be regarded as a legally-binding agreement deliberately created by, and between, two or more subjects of international law who are recognised as having treaty-making capacity. A treaty is an instrument governed by international law and, once it enters into force, the parties thereto have legally binding obligations in international law.
- There are a number of other examples of acts creating legal relations that do not amount to treaties as such. These include declaration under Art. 36(2) of the Statute of the ICJ; unilateral statements intended to have legal effect; acts having legal effect in national law; and acts giving rise to customary international law.
- The Vienna Convention on the Law of Treaties 1969 governs written treaties for state-parties to this Convention. However, much of the content of the Vienna Convention is now replicated in customary international law.
- The provisions of Part II of the Vienna Convention deal with rules pertaining to the creation of treaties in international law including authority to conclude treaties, modes of consent and entry into force.
- Reservations – Reservations can properly be regarded as unilateral statements made by a state at the time it gives its consent to be bound (or later if the treaty

permits) and which are intended to modify or exclude an otherwise binding treaty obligation. In some cases the reservation may not be effective (i.e. may not exclude or modify the obligation) until it has been accepted by other parties to the treaty, but this does not destroy its essential character as a unilateral act (VC Art. 2(1) (d)).

Reservations may be prohibited by a treaty and they may be objected to, or accepted by, other states. An objection to a reservation may prevent the entry into force of the treaty between the two states or it may merely modify the obligation.

- Treaty interpretation is governed by Arts 31 and 32 of the Vienna Convention, and these represent customary law. Preference is given to the ordinary meaning of the terms of the treaty in their context. The 'context' in which the 'ordinary meaning' is to be divined includes the preamble to a treaty and even agreements between the parties made in connection with the treaty. In Art. 32, the Convention deals with the use of the travaux préparatoires of a treaty as an aid to its interpretation. These are expressed to be 'supplementary means of interpretation' that may be used to confirm the meaning resulting from Art. 31.

- Third states – As a general rule, treaties are binding only on the parties. However, it is sometimes the case that parties to a treaty may intend to confer rights or obligations on third states (i.e. non-parties) without the latter becoming 'treaty states'.

- Inconsistent treaties – Under Art. 59 of the Convention, if all the parties to a treaty conclude a later treaty dealing with the same subject matter, then the prior treaty is considered terminated if this is the intention of the parties or the provisions of the earlier treaty are so incompatible with the terms of the later treaty that it is impossible to apply the two treaties at the same time.

- Jus cogens – Under Art. 53 of the Convention, a treaty is void if it conflicts with an existing rule of *jus cogens* and, under Art. 64, a treaty becomes void if it conflicts with an emerging rule of the same quality.

- A treaty may be terminated by a number of methods: consent; material breach by another party; supervening impossibility; fundamental change of circumstance.

International law and national law

- Monism – The monist theory supposes that international law and national law are simply two components of a single body of knowledge called 'law'. 'Law' is seen as a single entity of which the 'national' and 'international' versions are merely particular manifestations.

- Dualism – Dualism denies that international law and national law operate in the same sphere, although it does accept that they deal with the same subject matter.

- Different subject matter – Both monism and dualism accept that international law and national law deal with the same subject matter; that they are in fact concerned with the same substantive matters. This view says that the relationship between international law and national law is like the relationship between English law and French law: they never contradict each other as systems of law. It may be that the 'obligations' of each system come into conflict but then which obligation is to prevail is to be settled by the 'conflict of laws' rules of the particular court.

- National law may be used before international courts in a number of ways: as sources of law; as evidence of compliance with international obligations; to define concepts used in international law; as evidence of facts; as a component in the decision of the international tribunal.
- Incorporation and transformation – Under the doctrine of incorporation, a rule of international law becomes part of national law without the need for express adoption by the local courts or legislature. The rule of international law is incorporated in national law simply because it is a rule of international law. The doctrine of transformation, on the other hand, stipulates that rules of international law do not become part of national law until they have been expressly adopted by the state. International law is not *ipso facto* part of national law.
- International law in UK courts – Treaties do not form part of UK law without express adoption in a statute and cannot generally be pleaded in UK courts if not adopted. Customary international law may be incorporated directly into UK law. However, this simple picture disguises the fact that the relationship may depend on the content of the alleged rule of international law rather than its origin.

Personality, statehood and recognition

- A subject of international law is a body or entity that is capable of possessing and exercising rights and duties under international law.
- The main capacities of an international legal person are the ability to make claims before tribunals; to be subject to some or all of the obligations imposed by international law; to have the power to make valid international agreements; to enjoy some or all of the immunities from the jurisdiction of the national courts of other states.
- States are the most important and most powerful of the subjects of international law. Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 says that the 'state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states'.
- The relative nature of international personality, whereby a 'subject' may have certain rights and duties for certain purposes, means that states are not the only territorial entities that can be regarded as subjects of international law.
- There are now more international organizations than at any time previously in the history of international law. In order that they may be able to carry out their allotted tasks, they must enjoy some measure of international personality.
- The clearest example of the personality of individuals in modern international law is the responsibility that each individual bears for war crimes, crimes against the peace and crimes against humanity. In addition to the imposition of duties and responsibilities on individuals, international law also grants personality in the form of rights. The most obvious is the law of human rights.

- In the course of their commercial activities, states will deal not only with each other but also with companies and trading concerns from around the world. They may enjoy personality for purposes connected with these activities if their relations are governed by international law.
- According to the declaratory theory of recognition, when an existing state 'recognises' a new state, this is said to be nothing more than an acknowledgment of pre-existing legal capacity. The act of recognition is not decisive of the new entity's claim to statehood, because that status is conferred by operation of international law.
- The constitutive theory denies that international personality is conferred by operation of international law. The act of recognition is seen as a necessary precondition to the existence of the capacities of statehood.
- The UK continues to recognise states officially, but it no longer formally recognises governments. Non-recognition of a 'state' means that the 'state' has no capacity within the UK legal system.

Jurisdiction and sovereignty

- The 'first and foremost' rule of jurisdiction is that one state may not exercise jurisdiction in the territory of another state. Secondly, there is a general principle that a state is entirely free to project its jurisdiction over any matter taking place outside its territory, so long as this is not prohibited by a contrary rule of international law.
- The power of a state to bring any matter within the cognisance of its national law is called its prescriptive jurisdiction.
- Whereas a state may have a general power under international law to prescribe jurisdiction, the enforcement of that jurisdiction can generally take place only within its own territory.
- Jurisdiction over persons may be exercised on the following basis: objective and subjective territorial jurisdiction; nationality jurisdiction; universal jurisdiction; protective jurisdiction; passive personality jurisdiction.
- Sovereignty is the most extensive form of jurisdiction under international law. It denotes full and unchallengeable power over territory and all the persons from time to time therein. It may be subject to certain limitations, such as guarantees of human rights and diplomatic privileges, but apart from exceptions that are positively established, a state's sovereignty over its territory is absolute and complete.
- The control of territory and the peaceful and effective exercise of the functions of a state therein is the primary means of acquiring title to territory in international law.
- Discovery is akin to occupation in that it is usually applied in respect of previously uninhabited territories. Discovery per se gives only an inchoate title to territory. This means that unless the first act of discovery is followed up within a reasonable period of time by acts of effective occupation, the discoverer's title may be defeated by another state's effective display of state sovereignty.
- It is not uncommon in international law that one state cedes a piece of territory to another by treaty.

- Since 1945, the acquisition of title to territory by the use of force has been unlawful.
- *Uti possidetis* encompasses the idea that the frontiers of newly independent states should follow the frontiers of the old colonial territories from which they emerged and, importantly, that they cannot be easily altered by unilateral action.
- Self-determination is now a principle of international law. In the usual case, an exercise of the right of self-determination will result in the territory becoming independent, but it may apply to give groups within states limited autonomy without becoming independent.

Immunities from national jurisdiction

- The jurisdiction of a state within its own territory is complete and absolute. However, there is also a rule of international law that a foreign sovereign state is entitled to certain immunities from the exercise of this jurisdiction – generally known as the principle of state (or sovereign) immunity.
- There are several competing justifications of state immunity – states are legal equals; the local state voluntarily waives its jurisdiction; policy requires states to refrain from exercising jurisdiction over other states; enforcement of judgments is difficult; international comity justifies state immunity.
- Immunity under international law is not absolute, but restrictive, usually based around the nature of the act, but sometimes including the purpose of the act or the general context in which the act takes place. There is a UN Convention on Jurisdictional Immunities that is not yet in force but much of which represents customary law.
- Immunity is available even if the act is in violation of a fundamental rule of international law.
- Immunity in the UK is governed by the State Immunity Act 1978, which gives immunity except where it is denied. The overall effect is restrictive, based around a ‘commercial transaction’.
- Enforcement of judgments in the UK comes close to absolute immunity.
- Section 14 of the Act stipulates what constitutes ‘the state’ for the purposes of the 1978 Act.
- Diplomatic and consular immunities are personal in the sense that they are enjoyed by individuals, rather than by the state itself. However, as we shall see, the purpose of these immunities is not to benefit the individual as such, but to enable him to carry out his designated functions on behalf of the state. They are governed by two Vienna Conventions.

The law of the sea

- The ‘law of the sea’ involves consideration of matters of state sovereignty, state jurisdiction and state rights over the waters, sea bed, subsoil and airspace of the ‘sea’.

- Four multilateral conventions were concluded covering various aspects of the law of the sea in 1958. All these Conventions are in force, although in many respects they have been superseded by the 1982 Convention on the Law of the Sea.
- The sovereignty of a state extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast. This is the territorial sea.
- It has been the practice of states in the past to claim certain jurisdictional rights in a zone of waters beyond the outer edge of the territorial sea. Until the institution of the EEZ(Exclusive Economic Zone), this would have been an area of high seas and generally would not otherwise have been susceptible to the jurisdiction of the coastal state and is known as the contiguous zone.
- The EEZ is a belt of sea, adjacent to the coast, extending up to 200 miles from the baselines of the territorial sea. Within this area, the coastal state is given 'sovereign rights' for the purpose of exploring and exploiting the living and non-living natural resources of the area.
- It is now firmly established that continental shelf rights are 'inherent' in statehood. The rights that a coastal state exercises over the shelf exist as an extension of the statehood of the coastal state and do not have to be claimed or recognised by other states.
- The deep seabed is the common heritage of mankind but the 1982 Convention establishes a system of 'parallel access' for the international community and for individual states.
- The high seas are res communis and it is a basic principle of customary law (perhaps even of jus cogens) that all states, whether coastal or landlocked, may enjoy the 'freedom of the seas'. This bundle of rights comprises several distinct freedoms, such as the freedom of navigation and overflight, the freedom to fish, the freedom to lay submarine cables and pipelines, the freedom to conduct scientific research and the freedom to construct artificial islands.
- The 1982 Convention includes comprehensive procedures for dispute settlement including a system of compulsory settlement involving reference to either the International Tribunal for the Law of the Sea, the ICJ (International Court of Justice) or certain arbitral tribunals established for various parts of the Convention.

State responsibility

- The rules of 'state responsibility' indicate the circumstances in which a state will be fixed with legal responsibility for the violation of an international obligation and the consequences this entails.
- State responsibility comprises two elements: an unlawful act, which is imputable to the state. Responsibility may be avoided if the state is able to raise a valid defense. If not, the consequence of responsibility is a liability to make reparation and/or suffer the consequences of being internationally responsible.
- Whether an act or omission perpetrated by organs or individuals is to be attributed to the state is a matter of international law. While international law may well use rules

of national law to help make this decision, the final determination is for the international system.

- It is axiomatic that breach of an international obligation entailing responsibility gives rise to legal consequences and this is a principle that is rooted in customary law.
- Not every prima facie breach of a legal obligation gives rise to legal responsibility. International law recognises that the state may have a valid defense to a charge of unlawful conduct. These are known as 'circumstances precluding wrongfulness'.
- Every state is under an international obligation not to ill-treat foreign nationals present in its territory. If the state violates this obligation in any way it may incur international responsibility to the state of which the person is a national.
- The expropriation (or nationalization) of property owned by foreign nationals is one particular example of the rules relating to the treatment of aliens that may give rise to international responsibility.

The peaceful settlement of disputes

- According to Art. 2(3) of the United Nations Charter, all members 'shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. There is no doubt that this principle is one of the central obligations of international law.
- The most common method of settlement is direct negotiations between the parties. This 'method' accounts for the great majority of settlements between states and appears to be the one most preferred.
- 'Good offices' are a preliminary to direct negotiations between the parties. Mediation is a continuation of this, and often the mediator will be the person who originally brought the parties together.
- The United Nations has a variety of institutionalized and informal methods through which states may settle disputes.
- Arbitration is 'a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted'. It is the most commonly used 'judicial' means for the settlement of disputes.
- The International Court of Justice exercises an important jurisdiction based on the consent of states. This consent may be given in advance of a dispute arising, but only states may be parties before the Court.
- Under Art. 36(2) of the Statute of the ICJ, states may accept, in advance, the jurisdiction of the Court. Acceptance of jurisdiction is by means of a unilateral Declaration of Acceptance, deposited with the UN Secretary-General. The system is optional in the sense that states may become parties to the Statute without making Declarations of Acceptance and is based on reciprocity.

The use of force

- 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any

other manner inconsistent with the Purposes of the United Nations' – Art. 2(4) UN Charter. This is one of the central obligations of the Charter and, in terms, it stipulates a general prohibition of the unilateral use of force. It is a rule of *jus cogens*.

- States have the right to use force in self-defense. There is a debate as to whether this is limited to the conditions of Art. 51 of the UN Charter or is available in wider circumstances. It is also permissible to use force in collective self-defense.
- One state may request the deployment of another state's military forces in its territory. Likewise, a state may give permission for the use of force on its territory for any lawful purpose.
- Under the 'doctrine' of humanitarian intervention it is alleged that one state (State A) may use force in the territory of another state (State B) in order to protect the human rights of individuals in State B, usually being nationals of State B. This is controversial in international law.
- Under the UN collective security system, the Security Council is given specific powers in Chapter VII of the Charter to act in the maintenance of international peace and security, even if this means using force itself.
- Under Art. 53 of the Charter, the Security Council may utilize regional organizations for 'enforcement action'. This is essentially a delegation of function by the Council to the regional organizations, although the authority clearly remains with the former.

GLOSSARY

Arab League Established in 1945 as a loose association of independent states geared to cooperation in a variety of economic and political affairs.

Customary international law International law developed through the practice of states.

de facto As a fact.

de jure As of right.

ex aequo et bono A decision of the ICJ based not on strict rules of international law but on such general principles as seem appropriate to the Court.

International Law Commission The body charged by the UN with the development and codification of international law. It consists of thirty-four independent members representing the major legal systems of the world. Proposals are drawn up by a Special Rapporteur and then modified and adopted as Draft Articles.

jure gestionis Acts *jure gestionis* are state acts of a commercial nature.

jure imperii Acts *jure imperii* are state acts of a sovereign or governmental nature.

jus cogens Certain fundamental rules of customary international law incapable of being modified by treaty.

opinio juris A necessary component in the formation of customary law: the belief that a practice is obligatory rather than habitual.

Organisation of African Unity (OAU) Established in 1963 as a forum for political, economic and social cooperation in Africa. Its main organ is the Assembly of Heads of State or Government which meets annually. Now called the African Union.

Organisation of American States (OAS) Formally established by the Pact of Bogotá in 1948, the Organisation grew out of a series of inter-American conferences held over the previous fifty years.

pacta sunt servanda The rule that treaties are binding on the parties, often said to be a rule of customary law.

par in parem non habet imperium Expresses the idea that one sovereign state cannot exercise jurisdiction over another sovereign state because of their legal equality.

res communis A description applied to areas of territory indicating that they are not open to acquisition by any state but may be enjoyed by any member of the international community.

terra nullius Territory which does not belong to any state or people. It may therefore be acquired by occupation.

travaux préparatoires The preparatory material containing the negotiating history of a treaty or international conference.

Treaties or international conventions Agreements between states or other subjects of international law creating rights and duties enforceable in international law.

United Nations (UN) The UN is the successor to the League of Nations with its Headquarters in New York and offices around the world (e.g. Geneva, Vienna). At the time of writing, membership stands at 188. The UN Charter is the Organisation's constitution, but as a treaty it is also a major source of the current rules of international law. The UN has six principal organs:

General Assembly Each member of the UN is a member of the Assembly, with one vote. The Assembly is the main policy making body of the UN and it can instigate initiatives covering all the UN's activities. Resolutions are adopted by majority vote, although most are not binding in law. It meets annually, usually in New York.

Security Council Technically the most powerful organ of the UN, the Council is charged primarily with the maintenance of international peace and security. At any one time, there are fifteen members of the Council, including the five Permanent Members – China, France, UK, USA and Russia – who have the power to veto any substantive resolution. The Council may impose economic or military sanctions on delinquent states.

Trusteeship Council Responsible for the supervision of non-self governing territories with a view to their eventual independence. No Trust Territories remain.

Economic and Social Council Responsible for UN activity in the field of economic and social welfare, including general responsibility for human rights.

Secretariat Responsible for the day-to-day running of the Organisation. Its head is the Secretary-General, the head of the Organisation. It is tantamount to an international civil service.

International Court of Justice (ICJ) The primary judicial organ of the UN, charged with the peaceful resolution of disputes according to international law. It is the successor to the Permanent Court of International Justice.

uti possidetis The principle that the frontiers of newly independent states should conform to the frontiers of the colonial territories from which they emerged.

AHG	Assembly of Heads of State and Government, OAU
AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
Carricom	Caribbean Common Market
CLCS	Commission on the Limits of the Continental Shelf
CMLR	Common Market Law Reports
CRAMRA	Convention on the Regulation of Antarctic Mineral Resource Activities
CSC	Continental Shelf Convention 1958
EC	European Community
ECOSOC	Economic and Social Council (UN)
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
EFZ	Exclusive Fisheries Zone
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EU	European Union
GA Res.	General Assembly Resolution
GATT	General Agreement on Tariffs and Trade
HSC	High Seas Convention 1958
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICLQ	International Comparative Law Quarterly
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILQ	International Law Quarterly
ILR	International Law Reports
IMF	International Monetary Fund
IRC	Inland Revenue Commissioners
ITLOS	International Tribunal for the Law of the Sea
LNOJ	League of Nations Official Journal
LOS 1982	Law of the Sea Convention 1982
OAS	Organisation of American States
OAU	Organisation of African Unity, now the African Union
OSCE	Organisation for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organisation
RIAA	Reports of International Arbitral Awards
SC Res.	Security Council Resolution
SWAPO	South West Africa People's Organisation
TRNC	Turkish Republic of Northern Cyprus
TSC	Territorial Sea Convention 1958
UN	United Nations

UNDOF	United Nations Disengagement Observations Force
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFICYP	United Nations Force in Cyprus
UNIFIL	United Nations Interim Force in Lebanon
UNRWA	United Nations Relief and Works Agency
VC	Vienna Convention
WHO	World Health Organization

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