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Dr Stephen Allen
Queen Mary, University of London

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Introduction

International law is a popular subject which attracts large numbers of students. However, students often struggle with a number of its substantive topics. In part, this is because international law is very different from most other subjects that many students will have encountered. Many legal subjects (e.g. contract law) exist within a national law framework. Their rules are contained within recognised sources of law (e.g. in a statute), produced by established institutions whose authority to create law is unquestioned (e.g. Parliament). Such rules are liable to be enforced by the courts. In short, a national legal system is a hierarchical legal system. In sharp contrast, international law regulates relations between States and it recognises that all States are equal and sovereign. The international legal system does not have a central legislature nor a court endowed with compulsory jurisdiction to resolve legal disputes. In essence, it is a horizontal legal system. Consequently, international law is a very different kind of 'law' from national law and the fundamental differences between the discrete areas of national law and international law can prove to be quite challenging for students. These differences can impact on any analysis of the nature of the international legal system; they can make it difficult to identify when international law has been created or changed; and they can make it difficult to identify and interpret international legal rules.

As a result, students face significant challenges in answering assessment questions in this subject. Questions often focus on theoretical legal issues. This book helps you to answer such questions, first, by highlighting the abstract issues that have shaped the subject. Second, it identifies the subject's pervasive themes so that you can understand discrete topics in a wider context. Finally, the book uses a range of innovative devices to provide you with strategic advice on how to recognise problematic aspects of international law and how best to tackle them.

Another challenge that international law presents to students is the fact that its various topics are closely interrelated. An assessed question will often involve a number of discrete topics. Accordingly, you will need to acquire a sound knowledge of a wide range of topics and you will also need to understand how they relate to each other. This book advises you on the best way to enhance your technique of answering assessed problems and essay questions. It shows you how to identify the applicable law; how to construct relevant arguments by reference to the most appropriate legal sources; and how to relate the discrete topics of international law to one another in a structured and coherent manner.

However, you should appreciate that the present book is no substitute for a good textbook. It enables you to consolidate and make sense of your learning. It offers you a concise account of the subject's key topics with the aim of providing you with targeted advice on how to improve your performance in assessed work by introducing you to a number of tried and tested revision methods and tips that will help you on the road to success.

REVISION NOTE

Use this book alongside your recommended textbook and the applicable primary sources (international instruments and cases).

International law topics are closely related and so it is important that you revise the whole syllabus of your international law module in order to give yourself the best opportunity of answering assessed questions well.

International law is quite different from any of the legal subjects that you have studied before. You should be sensitive to the unique challenges that it poses for international law as a form of 'law' and the implications that its unusual legal character has for assessed questions in this subject.

Before you begin, you can use the study plan available on the companion website to assess how well you know the material in this book and identify the areas where you may want to focus your revision.

Guided tour

How to use features in the book and on the companion website

Understand quickly

Topic maps – Visual guides highlight key subject areas and facilitate easy navigation through the chapter. Download them from the companion website to pin on your wall or add to your revision notes.

Key definitions – Make sure you understand essential legal terms.

Key cases and key statutes – Identify and review the important elements of essential cases and statutes you will need to know for your exams.

Read to impress – These carefully selected sources will extend your knowledge, deepen your understanding, and earn better marks in coursework and exams.

Glossary – Forgotten the meaning of a word? This quick reference covers key definitions and other useful terms.

Test your knowledge – How well do you know each topic? Test yourself with quizzes tailored specifically to each chapter.

Podcasts – Listen as your own personal Law Express tutor guides you through a step-by-step explanation of how to approach a typical but challenging question.

Revise effectively

Revision checklists – Identify essential points you should know for your exams. The chapters will help you revise each point to ensure you are fully prepared. Print the checklists from the companion website to track your progress.

Revision notes – These boxes highlight related points and areas where your course might adopt a particular approach that you should check with your course tutor.

Study plan – Assess how well you know a subject prior to your revision and determine which areas need the most attention. Take the full assessment or focus on targeted study units.

Flashcards – Test and improve recall of important legal terms, key cases and statutes. Available in both electronic and printable formats.

Take exams with confidence

Sample questions with answer guidelines – Practice makes perfect! Consider how you would answer the question at the start of each chapter then refer to answer guidance at the end of the chapter. Try out additional sample questions online.

Assessment advice – Use this feature to identify how a subject may be examined and how to apply your knowledge effectively.

Make your answer stand out – Impress your examiners with these sources of further thinking and debate.

Exam tips – Feeling the pressure? These boxes indicate how you can improve your exam performance when it really counts.

Don't be tempted to – Spot common pitfalls and avoid losing marks.

You be the marker – Evaluate sample exam answers and understand how and why an examiner awards marks.

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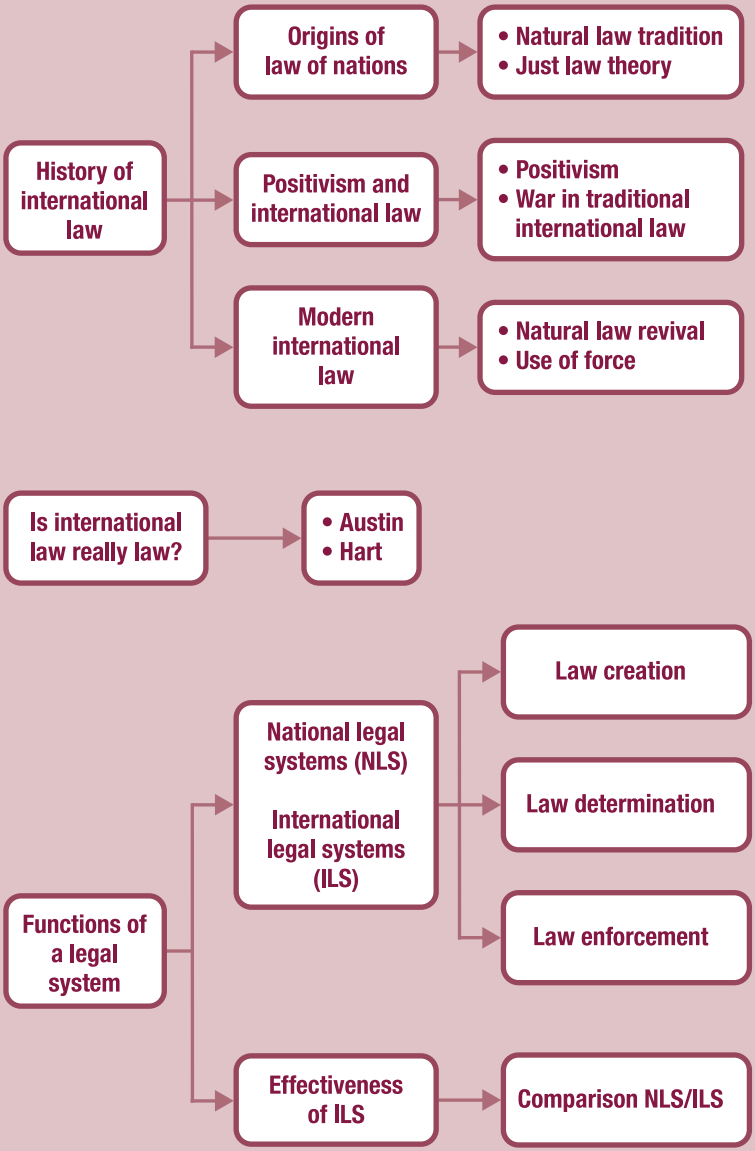
1 The nature of international law

Revision checklist

Essential points you should know:

- ☐ Overview of the history of international law
- ☐ Basic structure of the international legal system
- ☐ Foundational principles of international law
- ☐ Whether international law really is a form of 'law'
- ☐ Functions of a legal system
- ☐ Whether the international legal system is an effective legal system

Topic map



A printable version of this topic map is available from **www.pearsoned.co.uk/lawexpress**

Introduction

International law exists to regulate international society. International society is very different from any national society. Consequently, it should come as no surprise to you that the legal systems which regulate these societies are different as well. This chapter discusses the implications of these differences for international law.

ASSESSMENT ADVICE

Questions on this topic often take the form of essay questions. This is a result of the unique characteristics of the international legal system, which have led some to question whether international law is really a form of law. These doubts have generated enquiries into the theoretical foundations of international law. Students need to acquire a good understanding of the nature of law. It is also helpful to appreciate how the international legal system works in practice and to identify appropriate cases which demonstrate international law's effectiveness.

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Guidelines on answering the question are included at the end of this chapter, whilst another sample essay question and guidance on tackling it can be found on the companion website.

ESSAY QUESTION

'A legal system grounded in the will of its subjects, that does not possess a centralised legislature or effective means for its enforcement cannot be a form of law at all.' Discuss.

International law and international society

Before the founding of the United Nations in 1945, **international law** was largely concerned with the rights and obligations of States. It worked on the assumption that States would look after the interests of their own citizens. Much has changed since this time but States still play a central role in the creation, interpretation and application of international law.

KEY DEFINITION: International law

'International law may be described as a body of rules and principles that determine the rights and duties of states primarily in respect of their dealing with other states and the citizens of other states.' Lowe (2007), 5.

International society was conceived as a political society organised on a non-hierarchical basis with States constituting its members (or basic units). This society provided a way for independent States to coexist in an unstable world and international law was developed to maintain international society. It did this by recognising and protecting the sovereignty of States; and by regulating a number of limited common aims that had been agreed by States and were consistent with international society's nature.

A brief history of international law

Early international law and the natural law tradition

KEY DEFINITION: The natural law tradition

Natural law theorists claim that law is fundamentally connected to morality; they believe that a body of universal legal rights and obligations naturally exist and are discoverable through the exercise of reason.

The natural law tradition owes much to the work of the Roman Stoics (e.g. Cicero (106–43 BC)). During the early modern period, legal scholars (e.g. de Vitoria (1492–1546) and Grotius (1583–1645) harnessed a wide range of natural law principles to underpin the fledgling Law of Nations (or early international law). However, it is important to note that natural law doctrine amounts to a philosophical standpoint rather than a comprehensive set of legal rules and principles that could provide the foundations for a concrete international legal system. The early Law of Nations was envisaged as a practical endeavour – a means of regulating international society – rather than as the basis for some form of universal law.

During the sixteenth and seventeenth centuries the authority and power of the Catholic Church and the Holy Roman Empire began to wane as a result of the rise of powerful Protestant nations. Grotius tried to find a way of organising international relations that was not based solely on religious doctrine. In an effort to construct a Law of Nations, Grotius drew upon the rules and principles of Roman law (*jus gentium*) which had functioned as a basic international legal system during Roman times.

Attempts to develop a modern Law of Nations were assisted by the 1648 Peace of Westphalia, which brought an end to the Thirty Years War fought between Catholic and Protestant nations within Europe. The parties sought to reconstruct international society as a practical association of independent nations, constituted on a secular basis. This version of international society was designed to promote peaceful coexistence rather than common substantive values (such as religious doctrine). The 1648 treaty was largely responsible for entrenching sovereign authority and sovereign equality as the foundational concepts of the modern international legal system. It recognised that nations had considerable freedom of action and that the legal regulation of international society was essentially negative in nature. In other words, nations could largely do as they pleased as long as their actions did not contravene a narrow range of activities that were prohibited by international law.

REVISION NOTE

The influence of the natural law tradition in the early Law of Nations is evident in the just war theory. Grotius adopted a standpoint – derived from the work of Thomas Aquinas (1225–1274) – that war fulfilled a quasi-judicial function. It could be waged only if there was just cause (in self-defence, as a means of securing reparations for injuries suffered or to punish material breaches of law).

Positivism and international law

KEY DEFINITION: Positivist international law

International law arises from the free will of States and is distinct from moral considerations. The legal validity of these rules and principles arises from the way that they were created (i.e. by the prescribed legal method).

As the Law of Nations evolved into a substantial body of rules and principles, international lawyers began to concentrate more on the development of positive law (socially created legal rules) than on the extraction of natural law principles, as apparent from the work of Vattel (1714–1767). The rise of nationalism and administrative advancements facilitated the centralisation of political authority which, in turn, prompted the rise of the State as an

organisational form. These developments allowed States to re-evaluate the universalist assumptions upon which the Law of Nations was seemingly founded. To this end, they began to ignore systematically the natural law standpoint that recognised fundamental equality of all nations and began to develop the notion of the so-called 'Family of Nations', which included essentially the European States (and their derivatives). Membership was strictly limited to those political communities that could satisfy that supposed test of 'civilisation' and could adopt the European model of political organisation, the State (see Westlake (1828–1913)). It was during this time that the twin concepts of State sovereignty and sovereign equality assumed their full significance and positivism was instrumental to this development.

Positivism was particularly useful to the European colonial powers because it allowed them to ignore ethical issues during the colonial encounter and to focus on legal formalism instead (e.g. whether the correct procedures had been followed when a treaty had been concluded with a political community rather than on the substance of such treaties). See Anghie (2004).

Further, positivism was also significant for States in their dealings with one another because it recognised that international law was driven by the interests of States and thus political considerations dictated the content of its rules and principles.

REVISION NOTE

During the eighteenth and nineteenth centuries, war was considered to be a legitimate instrument for States to use in the conduct of their international affairs. The idea that a State had to have just cause in order to use force was abandoned, a shift which favoured those States which possessed the greatest military strength. An important aspect of this approach was that there was no duty of non-recognition concerning the territorial (and other) gains secured by the use or threat of force. See Chapter 4 for the duty of non-recognition in international law.

Modern international law

The foundational principles of the international legal system are:

- sovereign authority (that all States possess supreme legal authority within their own territory); and
- sovereign equality (all States have equal status within the international legal system).

The importance of the twin principles of State sovereignty and sovereign equality during the modern era was evident from the decision made by the Permanent Court of International Justice (PCIJ) in the *Lotus Case* (1927).

KEY CASE

***The Lotus Case* (1927) PCIJ Series A, No. 10**

Concerning: criminal jurisdiction regarding a collision on the High Seas
Legal issue: that international law is created by the consent of States

Facts

A French ship collided with a Turkish ship on the High Seas. The collision caused the Turkish ship to sink, and it resulted in the loss of life. The French ship sailed to a Turkish port where a French Officer was charged with manslaughter by the Turkish authorities.

Legal principle

The main question for the Court was whether Turkey's exercise of jurisdiction amounted to a violation of international law. However, it made the following observations on the nature of international law:

> The rules of law binding upon States . . . emanate from their own free will as expressed by the conventions or by the usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. (at 18)

The '***Lotus* principle**' holds that international law is the product of the free will of States. International law cannot be created without the consent of States and it cannot be imposed upon them. Consequently, the actions of States are presumed to be lawful unless they have been specifically prohibited by international law.

REVISION NOTE

The idea that international law is based on the consent of States is explored in Chapter 2.

The principle of State sovereignty is now expressed in:

- Article 2(4), UN Charter: '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.'
- Article 2(7), UN Charter: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter . . .'

The principle of sovereign equality is contained in:

- Article 2(1), UN Charter: 'The Organization is based on the principle of sovereign equality of all its Members.'

The above principles were elaborated upon in the UN Declaration on the Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (GA Res. 2625, 1970). This Declaration subsequently acquired the status of **customary international law (CIL).**

REVISION NOTE

The above norms are not the only fundamental principles of international law. We will be discussing other such principles in this book. However, it is worthwhile refreshing your memory by reading Article 2, UN Charter and the UN Declaration on Friendly Relations and the Principles of International Law (1970). Also, see Figure 1.1.

Figure 1.1 Key principles of international law

Key principles	Authority	Source
1 State sovereignty	Article 2(7), UN Charter Principle 6, GA Res. 2625 (1970) *Lotus Case* (1927)	Treaty CIL PCIJ (subsidiary means)
2 Sovereign equality	Article 2(1), UN Charter Principle 6, GA Res. 2625 (1970) *Lotus Case* (1927)	Treaty CIL PCIJ (subsidiary means)
3 Prohibition on the use of force	Article 2(4), UN Charter Principle 1, GA Res. 2625 (1970) *Nicaragua Case* (1986)	Treaty CIL ICJ (subsidiary means)

Source: Article 38(1) ICJ Statute

Key developments in international law in the UN period

International law does not just exist to regulate inter-State relations. International Governmental Organizations (IGOs) and individuals now have certain rights/obligations in international law (see Chapter 4).

It is possible to claim that international law is based on universal values and it has a moral purpose which exists beyond inter-State considerations. Recent developments that support a purposive view of international law include:

- the recognition of universalist concepts of 'war crimes' and 'crimes against humanity' developed during the Nuremberg and Tokyo War Trials after the Second World War;
- the Universal Declaration of Human Rights (1948) identified a range of fundamental human rights and obligations;
- the development of a comprehensive range of multilateral human rights **treaties** (see below);
- the development of multilateral treaties concerned with protecting the global environment (e.g. the Framework Convention on Climate Change (1992) and the Kyoto Protocol (1997));
- the creation of extensive regional legal systems, which protect human rights (see below);
- the establishment of the International Criminal Court (ICC), which has jurisdiction to adjudicate on a number of serious international crimes (see below);
- the development of a category of peremptory norms (***jus cogens*** and **obligations *erga omnes***) (see Chapter 2).

Natural law and modern international law

Most modern international lawyers have not sought to resurrect classical naturalism in an effort to establish the theoretical foundations of the international legal system; instead they have typically preferred to engage in enquiries that concentrate on what States do rather than on what they ought to do. But while contemporary international lawyers focus on positive international law (the body of socially created rules and principles) they endeavour to soften legal norms by reference to progressive interpretations that reflect the natural law principles. However, in such situations, they do not usually claim that the principles of natural law are self-evidently (legally) binding, rather they argue that the rules and principles of international law should be developed so that they are consistent with natural law thinking.

Hersch Lauterpacht (1897–1960)

The work of Hersch Lauterpacht, one of the leading international lawyers of the twentieth century, challenged the orthodox view that international law arose exclusively from the consent of States. He argued that the behaviour of States was regulated and conditioned