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Featuring cases, materials, and illustrative figures throughout to enhance the level of context and detail provided, the book covers everything a student of international law requires. Topics include the law of treaties, international organisations, the international protection of human rights, responsibility in international law, jurisdiction, diplomatic and consular law, territory in international law, the law of the sea, international air and space law, international economic law, international environmental law, and international humanitarian law.

This comprehensive textbook will be essential reading not only for any course on international law, but also as a starting point for those wishing to grasp the context of a particular area of international law before exploring further.

David Patariaia is a professor at Tbilisi Ivane Javakishvili State University, Georgia. Professor Patariaia has been a practising lawyer and held certain high-ranking positions in Georgia, inter alia, he served as a commissioner in the Georgian National Communication Commission, the parliamentary secretary of the President of Georgia and the head of the administration of the President of Georgia.



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David Patarraia

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Contents

<i>Table of cases and materials</i>	<i>xiii</i>
<i>List of figures</i>	<i>xx</i>
<i>Preface</i>	<i>xxii</i>
<i>Acknowledgments</i>	<i>xxiv</i>
1. The essence of law and the nature of international law	1
<i>Introductory remarks</i>	<i>3</i>
<i>Legal systems</i>	<i>4</i>
<i>Theories of law</i>	<i>6</i>
<i>The essence of law</i>	<i>19</i>
<i>a) The law as a normative system</i>	<i>19</i>
<i>b) The law as a systematised body of norms</i>	<i>22</i>
<i>c) The law as instituted by the state or the interstate system</i>	<i>24</i>
<i>d) The law as applied through the structure which has instituted it</i>	<i>26</i>
<i>e) The mission of law – to avoid conflicts and to establish civil peace</i>	<i>28</i>
<i>The notion of international law</i>	<i>29</i>
<i>Development of international law</i>	<i>30</i>
<i>Specifics of international law</i>	<i>38</i>
<i>a) Interstate system</i>	<i>39</i>
<i>b) State as the main subject of international law</i>	<i>40</i>
<i>c) Sources and norms of international law</i>	<i>42</i>
<i>d) International law as applied by subjects</i>	<i>43</i>
<i>e) Avoidance of war and institution of peace</i>	<i>44</i>
<i>Cases and materials (selected parts)</i>	<i>46</i>
2. Sources of international law	59
<i>Article 38 of the Statute of the International Court of Justice</i>	<i>61</i>
<i>International treaty</i>	<i>62</i>

<i>International custom</i>	65
<i>General principles of law</i>	70
<i>Unilateral acts of states</i>	78
<i>Subsidiary means</i>	80
<i>Soft law</i>	81
<i>The complex arrangement of international law – is there a hierarchy?</i>	83
<i>International law and national law</i>	98
<i>Cases and materials (selected parts)</i>	104
3. Principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations	127
<i>The notion of the principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations</i>	130
<i>The formation of the principles of international law relating to friendly relations and co-operation among states</i>	131
<i>The list of the principles of international law relating to friendly relations and co-operation among states</i>	132
<i>Equality – sovereign equality, respect for the rights inherent in sovereignty</i>	134
<i>Independence – non-intervention in internal affairs</i>	135
<i>Peaceful co-existence – refraining from the threat or use of force</i>	138
<i>The historical origins</i>	138
<i>Aggression</i>	141
<i>Right to self-defence</i>	146
<i>Collective security system</i>	151
<i>Humanitarian intervention</i>	159
<i>Neutrality</i>	165
<i>Peaceful co-existence – pacific settlement of disputes</i>	171
<i>Direct negotiation, good offices, and mediation</i>	172
<i>Inquiry and conciliation</i>	173
<i>International arbitration</i>	175
<i>International courts</i>	179
<i>Cases and materials (selected parts)</i>	184
4. The notion of the subjects of international law and the state as the main subject	204
<i>The notion of the subject of international law</i>	205
<i>State</i>	208

<i>Traditional criteria of statehood</i>	209
<i>The concept of sovereignty</i>	213
<i>Recognition</i>	215
<i>State succession</i>	220
<i>Extinction of statehood</i>	227
<i>Cases and materials (selected parts)</i>	230
5. Other subjects of international law	247
<i>The people as a subject of international law</i>	249
<i>The genesis of the principle of equal rights and self-determination of peoples</i>	249
<i>Defining self-determination</i>	253
<i>The self-determination unit</i>	260
<i>Mandated and trust territories and non-self-governing territories</i>	264
<i>International administration of territories</i>	272
<i>Insurgents, belligerents, and national liberation movements</i>	274
<i>Sui generis entities</i>	276
<i>Taiwan</i>	277
<i>Hong Kong</i>	280
<i>The Holy See and the Vatican City</i>	282
<i>The Sovereign Order of Malta</i>	288
<i>International Committee of the Red Cross and International Red Cross and Red Crescent Movement</i>	291
<i>International organisations</i>	294
<i>Individuals</i>	296
<i>Cases and materials (selected parts)</i>	297
6. The law of treaties	319
<i>Basic documents on the law of treaties</i>	321
<i>Principles of the law of treaties</i>	322
<i>Definition and structure of an international treaty</i>	323
<i>Conclusion of an international treaty between states</i>	325
<i>Conclusion of international treaties and other subjects of international law</i>	333
<i>Interpretation of international treaties</i>	335
<i>Amendment and modification of international treaties</i>	336
<i>Invalidity, termination, and suspension of the operation of an international treaty</i>	337
<i>Armed conflicts and international treaties</i>	345
<i>Cases and materials (selected parts)</i>	347

7. International organisations	373
<i>International institutions</i>	376
<i>United Nations</i>	379
<i>Foundation of the United Nations</i>	380
<i>General Assembly</i>	383
<i>Security Council</i>	388
<i>Economic and Social Council</i>	390
<i>Trusteeship Council</i>	391
<i>Secretariat</i>	393
<i>International Court of Justice</i>	394
<i>United Nations Specialised Agencies and Related Organisations</i>	395
<i>European Communities and the European Union</i>	399
<i>From economic to political union</i>	400
<i>From the European Union's three pillars concept to the system of the distribution of competences</i>	403
<i>The European Union's structure</i>	405
<i>The legal nature of the European Union</i>	414
<i>European Union law</i>	416
<i>The Council of Europe</i>	422
<i>The North Atlantic Treaty Organisation</i>	424
<i>Organisation for Security and Co-operation in Europe</i>	427
<i>Organisation of American States</i>	429
<i>The African Union</i>	433
<i>The League of Arab States</i>	436
<i>The Association of Southeast Asian Nations</i>	438
<i>Cases and materials (selected parts)</i>	441
8. The international protection of human rights	465
<i>To the basics of the concept</i>	467
<i>Human rights milestones</i>	469
<i>Three generations of human rights</i>	476
<i>The implementation of the universal regime of human rights</i>	479
<i>The United Nations internal human rights bodies</i>	480
<i>Human rights treaty bodies</i>	482
<i>Regional protection of human rights</i>	485
<i>European human rights regime</i>	487
<i>Human rights regime in the Americas</i>	498
<i>African human rights regime</i>	505
<i>Cases and materials (selected parts)</i>	509

9. Responsibility in international law	536
<i>The general concept of responsibility</i>	538
<i>State responsibility</i>	541
<i>Attribution of conduct to a state</i>	542
<i>Circumstances precluding wrongfulness</i>	543
<i>Content of the international responsibility of a state</i>	545
<i>Implementation of the international responsibility of a state</i>	552
<i>Responsibility of international organisations</i>	554
<i>Individual criminal responsibility in international law</i>	555
<i>From the ad hoc tribunals to the permanent international criminal court</i>	557
<i>International Criminal Court</i>	563
<i>International crimes</i>	566
<i>Cases and materials (selected parts)</i>	574
10. Jurisdiction	593
<i>The dimensions of jurisdiction</i>	595
<i>The notion of jurisdiction</i>	597
<i>Lotus principle</i>	598
<i>The principles of jurisdiction</i>	600
<i>Territoriality principle</i>	600
<i>Nationality principle</i>	602
<i>Extraterritorial jurisdiction</i>	605
<i>Criminal jurisdiction</i>	607
<i>Civil jurisdiction</i>	612
<i>Recognition and enforcement of foreign judgments, arbitral awards, and cross-border criminal justice co-operation</i>	618
<i>Immunity from jurisdiction</i>	624
<i>Cases and materials (selected parts)</i>	627
11. Diplomatic and consular law	647
<i>Distinction between diplomatic and consular relations</i>	649
<i>Diplomatic relations and diplomatic mission</i>	651
<i>Functions of a diplomatic mission of a state</i>	653
<i>Members of a diplomatic mission of a state</i>	654
<i>Appointment of the heads and members of the diplomatic staff of missions of a state</i>	659
<i>Diplomatic privileges and immunities</i>	660
<i>Termination of a diplomatic mission or of the functions of a diplomatic agent of a state</i>	666

<i>Diplomatic law and international organisations</i>	667	
<i>Consular relations and consular posts</i>	672	
<i>Consular functions</i>	673	
<i>Members of a consular post</i>	675	
<i>Appointment of heads of consular posts and other consular officers</i>	676	
<i>Consular privileges and immunities</i>	678	
<i>Termination of the consular functions</i>	683	
<i>Cases and materials (selected parts)</i>	684	
12. Territory		709
<i>Territory under international law</i>	711	
<i>State territory</i>	713	
<i>State boundaries</i>	715	
<i>The acquisition of additional territory</i>	716	
<i>Occupation and accretion</i>	718	
<i>Prescription</i>	723	
<i>Cession, adjudication, and boundary allocation decisions</i>	724	
<i>Annexation</i>	730	
<i>Minor rights over state territory</i>	732	
<i>Transfer of administration</i>	733	
<i>International lease</i>	735	
<i>International servitude</i>	736	
<i>International canals and rivers</i>	739	
<i>Polar regions</i>	743	
<i>Antarctic</i>	744	
<i>Arctic</i>	746	
<i>Cases and materials (selected parts)</i>	749	
13. The law of the sea		769
<i>The complex approach</i>	771	
<i>Internal waters</i>	774	
<i>Territorial sea</i>	778	
<i>Contiguous zone</i>	781	
<i>Exclusive economic zone</i>	782	
<i>Continental shelf</i>	783	
<i>Straits used for international navigation</i>	785	
<i>Archipelagic waters</i>	788	
<i>High seas</i>	791	
<i>The deep seabed</i>	794	

	<i>International institutions</i>	797	
	<i>Settlement of international disputes</i>	800	
	<i>Cases and materials (selected parts)</i>	809	
14.	International air and space law		829
	<i>Different approaches</i>	831	
	<i>Where airspace ends and outer space begins</i>	831	
	<i>Airspace</i>	833	
	<i>Air services</i>	833	
	<i>Liability</i>	838	
	<i>Aviation security</i>	841	
	<i>Outer space</i>	849	
	<i>The principles of space law</i>	849	
	<i>Moon Agreement</i>	855	
	<i>International liability for damage caused by space objects</i>	857	
	<i>Jurisdiction</i>	859	
	<i>International institutions</i>	861	
	<i>Cases and materials (selected parts)</i>	865	
15.	International economic law		887
	<i>Definition, sources, and subfields of international economic law</i>	889	
	<i>The Bretton Woods system</i>	890	
	<i>International finance law</i>	893	
	<i>International trade law</i>	903	
	<i>International investment law</i>	917	
	<i>Cases and materials (selected parts)</i>	941	
16.	International environmental law		962
	<i>International environmental law as a branch of international law</i>	964	
	<i>Development of international environmental law and its sources</i>	970	
	<i>Defining the environment and the principles of international environmental law</i>	987	
	<i>Sustainable Development Goals and targets</i>	996	
	<i>International environmental governance and defining 'pollution'</i>	1003	
	<i>The main fields of substantive international environmental law</i>	1007	
	<i>Conservation of nature and protection of the terrestrial and marine environments</i>	1007	
	<i>Climate and atmosphere</i>	1020	
	<i>Hazardous substances and activities</i>	1025	
	<i>Cases and materials (selected parts)</i>	1031	

17. International humanitarian law	1050
<i>From the law of war to international humanitarian law</i>	1052
<i>The basics of international humanitarian law</i>	1055
<i>The methods and means of warfare</i>	1061
<i>Nuclear weapons</i>	1066
<i>International and non-international armed conflicts</i>	1074
<i>Persons and objects under the protection of international humanitarian law</i>	1080
<i>Cases and materials (selected parts)</i>	1089
 <i>Index</i>	 1106

Table of cases and materials

1. THE ESSENCE OF LAW AND THE NATURE OF INTERNATIONAL LAW

RENE DAVID AND JOHN E. C. BRIERLEY, <i>MAJOR LEGAL SYSTEMS IN THE WORLD TODAY</i>	46
THOMAS HOBBS, <i>LEVIATHAN OR THE MATTER, FORM AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL</i>	47
JOHN LOCKE, <i>TWO TREATISES OF GOVERNMENT</i>	49
LON L. FULLER, <i>THE MORALITY OF LAW</i>	50
JEREMY BENTHAM, <i>AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION</i>	51
JOHN AUSTIN, <i>THE PROVINCE OF JURISPRUDENCE DETERMINED</i>	52
HERBERT LIONEL ADOLPHUS HART, <i>THE CONCEPT OF LAW</i>	55
HANS KELSEN, <i>PURE THEORY OF LAW</i>	55
ANDREW CLAPHAM, <i>BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS</i>	56
DAVID HARRIS AND SANDESH SIVAKUMARAN, <i>CASES AND MATERIALS ON INTERNATIONAL LAW</i>	57

2. SOURCES OF INTERNATIONAL LAW

DRAFT CONCLUSIONS ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW OF 2018, INTERNATIONAL LAW COMMISSION	104
<i>CONTINENTAL SHELF CASE (LIBYAN ARAB JAMAHIRIYA/MALTA)</i> , JUDGMENT OF 3 JUNE 1985, INTERNATIONAL COURT OF JUSTICE	107
<i>NORTH SEA CONTINENTAL SHELF CASES (FEDERAL REPUBLIC OF GERMANY V DENMARK, FEDERAL REPUBLIC OF GERMANY V NETHERLANDS)</i> , JUDGMENT OF 20 FEBRUARY 1969, INTERNATIONAL COURT OF JUSTICE	108
<i>ASYLUM CASE (COLOMBIA V PERU)</i> , JUDGMENT OF 20 NOVEMBER 1950, INTERNATIONAL COURT OF JUSTICE	108
<i>MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA V UNITED STATES OF AMERICA)</i> , JUDGMENT OF 27 JUNE 1986, INTERNATIONAL COURT OF JUSTICE, DISSENTING OPINION OF JUDGE ODA	109

SOUTH WEST AFRICA (ETHIOPIA V SOUTH AFRICA, LIBERIA V SOUTH AFRICA),
 JUDGMENT OF 18 JULY 1966, INTERNATIONAL COURT OF JUSTICE,
 DISSIDENTING OPINION OF JUDGE TANAKA..... 110

EAST TIMOR (PORTUGAL V AUSTRALIA), JUDGMENT OF 30 JUNE 1995,
 INTERNATIONAL COURT OF JUSTICE 112

PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*),
 TEXT OF THE DRAFT CONCLUSIONS AND DRAFT ANNEX PROVISIONALLY
 ADOPTED BY THE DRAFTING COMMITTEE ON FIRST READING IN 2019,
 INTERNATIONAL LAW COMMISSION 113

EXCHANGE OF GREEK AND TURKISH POPULATIONS (GREECE V TURKEY),
 ADVISORY OPINION No. 10 OF 21 FEBRUARY 1925, PERMANENT COURT
 OF INTERNATIONAL JUSTICE 119

STATUTE OF THE INTERNATIONAL LAW COMMISSION 120

3. PRINCIPLES OF INTERNATIONAL LAW CONCERNING
 FRIENDLY RELATIONS AND CO-OPERATION AMONG
 STATES IN ACCORDANCE WITH THE CHARTER OF
 THE UNITED NATIONS

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY
 RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH
 THE CHARTER OF THE UNITED NATIONS 184

HELSINKI DECLARATION ON PRINCIPLES GUIDING RELATIONS BETWEEN
 PARTICIPATING STATES, THE FINAL ACT OF THE CONFERENCE ON SECURITY
 AND CO-OPERATION IN EUROPE 188

DEFINITION OF AGGRESSION. ANNEX TO THE UN GENERAL ASSEMBLY
 RESOLUTION – A/RES/3314(XXIX) 189

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
 (*NICARAGUA V UNITED STATES OF AMERICA*), JUDGMENT OF 27 JUNE 1986,
 INTERNATIONAL COURT OF JUSTICE 191

CHARTER OF THE UNITED NATIONS 192

LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS, ADVISORY OPINION,
 8 JULY 1996, INTERNATIONAL COURT OF JUSTICE 196

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 197

4. THE NOTION OF THE SUBJECTS OF INTERNATIONAL LAW
 AND THE STATE AS THE MAIN SUBJECT

REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS,
 ADVISORY OPINION, 11 APRIL 1949, INTERNATIONAL COURT OF JUSTICE 230

BADINTER ARBITRATION COMMISSION ON YUGOSLAVIA, OPINION No. 1
 OF 29 NOVEMBER 1991 232

THE MONTEVIDEO CONVENTION ON THE RIGHTS AND DUTIES OF STATES	233
LASSA OPPENHEIM, <i>INTERNATIONAL LAW: A TREATISE</i>	235
JAMES CRAWFORD, <i>THE CREATION OF STATES IN INTERNATIONAL LAW</i>	236
CORFU CHANNEL (<i>UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND v ALBANIA</i>), JUDGMENT OF 9 APRIL 1949, INTERNATIONAL COURT OF JUSTICE, SEPARATE OPINION BY JUDGE ALVAREZ.....	236
<i>FRONTIER DISPUTE (BURKINA FASO/REPUBLIC OF MALI)</i> , JUDGMENT OF 22 DECEMBER 1986, INTERNATIONAL COURT OF JUSTICE.....	237
VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES.....	239
5. OTHER SUBJECTS OF INTERNATIONAL LAW	
CHARTER OF THE UNITED NATIONS	297
DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES THE UN GENERAL ASSEMBLY RESOLUTION – A/RES/1514(XV) OF 14 DECEMBER 1960	302
<i>LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH-WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)</i> , ADVISORY OPINION, 21 JUNE 1971, INTERNATIONAL COURT OF JUSTICE	303
<i>WESTERN SAHARA, ADVISORY OPINION</i> , 16 OCTOBER 1975, INTERNATIONAL COURT OF JUSTICE	304
ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO, ADVISORY OPINION, 22 JULY 2010, INTERNATIONAL COURT OF JUSTICE.....	304
<i>REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING CERTAIN QUESTIONS RELATING TO THE SECESSION OF QUEBEC FROM CANADA</i> , JUDGMENT OF 20 AUGUST 1998, SUPREME COURT OF CANADA	305
THE SITUATION IN THE MIDDLE EAST, INCLUDING THE PALESTINIAN QUESTION. THE UN SECURITY COUNCIL RESOLUTION – S/RES/2334 (2016)	307
THE SITUATION RELATING KOSOVO. THE UN SECURITY COUNCIL RESOLUTION – S/RES/1244 (1999) OF 10 JUNE 1999	309
LATERAN PACTS OF 1929 BETWEEN THE HOLY SEE AND ITALY, THE TREATY OF CONCILIATION.....	311
6. THE LAW OF TREATIES	
VIENNA CONVENTION ON THE LAW OF TREATIES	347
RESERVATIONS TO TREATIES. ANNEX TO THE UN GENERAL ASSEMBLY RESOLUTION – A/RES/ 68/111 OF 19 DECEMBER 2013.....	364
CCPR GENERAL COMMENT NO. 24, ISSUES RELATING TO RESERVATIONS MADE UPON RATIFICATION OR ACCESSION TO THE COVENANT OR THE OPTIONAL	

PROTOCOLS THERETO, OR IN RELATION TO DECLARATIONS UNDER ARTICLE 41 OF THE COVENANT OF 4 NOVEMBER 1994, UN HUMAN RIGHTS COMMITTEE	366
EFFECTS OF ARMED CONFLICTS ON TREATIES, ANNEX TO THE UN GENERAL ASSEMBLY RESOLUTION – A/RES/66/99.....	367
7. INTERNATIONAL ORGANISATIONS	
CHARTER OF THE UNITED NATIONS	441
CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION.....	449
<i>NV ALGEMENE TRANSPORT – EN EXPEDITIE ONDERNEMING VAN GEND& LOOS V NETHERLANDS INLAND REVENUE ADMINISTRATION</i> , JUDGMENT OF 5 FEBRUARY 1963, COURT OF JUSTICE OF THE EUROPEAN UNION.....	455
<i>FLAMINIO COSTA V ENEL</i> , THE JUDGMENT OF 15 JULY 1964, COURT OF JUSTICE OF THE EUROPEAN UNION	456
THE NORTH ATLANTIC TREATY	457
CHARTER OF THE ORGANISATION OF AMERICAN STATES.....	460
8. THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS	
DECLARATION OF HUMAN AND CIVIC RIGHTS.....	509
THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.....	511
INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION	515
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.....	522
CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.....	528
9. RESPONSIBILITY IN INTERNATIONAL LAW	
RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS. THE UN GENERAL ASSEMBLY RESOLUTION A/RES/56/83	574
<i>CHORZÓW FACTORY (GERMANY V POLAND)</i> , JUDGMENT No.13 OF 13 SEPTEMBER 1928, PERMANENT COURT OF INTERNATIONAL JUSTICE.....	579
CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL	579
ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.....	584
<i>ELEMENTS OF CRIMES</i> , INTERNATIONAL CRIMINAL COURT	591
CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY.....	592
10. JURISDICTION	
<i>CASE OF THE S.S. 'LOTUS' (FRANCE V TURKEY)</i> , JUDGMENT No.9 OF 7 SEPTEMBER 1927	627

<i>BANKOVIĆ AND OTHERS V BELGIUM AND OTHERS</i> [GC] (DEC.), EUROPEAN COURT OF HUMAN RIGHTS	629
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA.....	630
DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND OF 1996 WITH COMMENTARIES, INTERNATIONAL LAW COMMISSION	630
CONVENTION ON CHOICE OF COURT AGREEMENTS	632
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS	636
MODEL TREATY ON EXTRADITION	638
CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY.....	641
11. DIPLOMATIC AND CONSULAR LAW	
VIENNA CONVENTION ON DIPLOMATIC RELATIONS.....	684
<i>UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN (UNITED STATES OF AMERICA V IRAN)</i> , JUDGMENT OF 24 MAY 1980, INTERNATIONAL COURT OF JUSTICE	694
VIENNA CONVENTION ON CONSULAR RELATIONS.....	697
CONVENTION ON SPECIAL MISSIONS	704
12. TERRITORY	
<i>TRAIL SMELTER CASE (UNITED STATES OF AMERICA V CANADA)</i> , DECISION OF 11 MARCH 1941 OF THE ARBITRAL TRIBUNAL	749
<i>WESTERN SAHARA</i> , ADVISORY OPINION OF 16 OCTOBER 1975, INTERNATIONAL COURT OF JUSTICE	749
<i>SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN CASE (INDONESIA/MALAYSIA)</i> , JUDGMENT OF 17 DECEMBER 2002, INTERNATIONAL COURT OF JUSTICE	751
<i>ISLANDS OF PALMAS CASE (UNITED STATES OF AMERICA V NETHERLANDS)</i> , AWARD OF THE TRIBUNAL OF ARBITRATION OF 4 APRIL 1928.....	752
HAY-BUNAU-VARILLA TREATY.....	752
CONVENTION BETWEEN THE UNITED KINGDOM AND CHINA RESPECTING AN EXTENSION OF HONG KONG TERRITORY.....	757
CONVENTION RESPECTING THE FREE NAVIGATION OF THE SUEZ MARITIME CANAL	757
TREATY CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL.....	759
PROTOCOL TO THE TREATY CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL	761
CONVENTION REGARDING THE REGIME OF NAVIGATION ON THE DANUBE.....	762
ANTARCTIC TREATY.....	765
DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL	767

13. THE LAW OF THE SEA

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA.....	809
CONVENTION REGARDING THE REGIME OF THE STRAITS.....	819
CORFU CHANNEL (<i>UK v ALBANIA</i>), INTERNATIONAL COURT OF JUSTICE, JUDGMENT OF 9 APRIL 1949.....	825
MOX PLANT CASE (<i>IRELAND v UNITED KINGDOM</i>), PROVISIONAL MEASURES, ITLOS, CASE No. 10, ORDER OF 3 DECEMBER 2001.....	826
M/V VIRGINIA G CASE (<i>PANAMA/GUINEA-BISSAU</i>), ITLOS, CASE No. 19, JUDGMENT OF 14 APRIL 2014.....	827

14. INTERNATIONAL AIR AND SPACE LAW

INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT	865
INTERNATIONAL AIR TRANSPORT AGREEMENT.....	867
EU-US AIR TRANSPORT AGREEMENT.....	869
THREATS TO INTERNATIONAL PEACE AND SECURITY CAUSED BY TERRORIST ACTS – S/RES/1566	875
THREATS TO INTERNATIONAL PEACE AND SECURITY CAUSED BY TERRORIST ACTS: PREVENTING AND COMBATING THE FINANCING OF TERRORISM – S/RES/2462	876
TREATY ON PRINCIPLES GOVERNING THE ACTIVITIES OF STATES IN THE EXPLORATION AND USE OF OUTER SPACE, INCLUDING THE MOON AND OTHER CELESTIAL BODIES	877
CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS.....	880

15. INTERNATIONAL ECONOMIC LAW

ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND	941
ARTICLES OF AGREEMENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT.....	943
MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANISATION.....	945
'GENERAL AGREEMENT ON TARIFFS AND TRADE', THE WTO AGREEMENTS SERIES 2.....	949
NOTTEBOHM (<i>LIECHTENSTEIN v GUATEMALA</i>), JUDGMENT OF 6 APRIL 1955, INTERNATIONAL COURT OF JUSTICE	950
CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY.....	951
CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES.....	954
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION AND ARBITRATION RULES.....	956

16. INTERNATIONAL ENVIRONMENTAL LAW

DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT	1031
REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT.....	1035
INSTITUTIONAL AND FINANCIAL ARRANGEMENTS FOR INTERNATIONAL ENVIRONMENTAL COOPERATION, THE UN GENERAL ASSEMBLY RESOLUTION A/RES/2997(XXVII).....	1039
CHANGE OF THE DESIGNATION OF THE GOVERNING COUNCIL OF THE UNITED NATIONS ENVIRONMENT PROGRAMME, THE UN GENERAL ASSEMBLY RESOLUTION A/RES/67/251	1042
TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, THE UN GENERAL ASSEMBLY RESOLUTION A/RES/70/1	1042
RENEWING THE UNITED NATIONS: A PROGRAMME FOR REFORM, REPORT OF THE SECRETARY-GENERAL	1044
GAPS IN INTERNATIONAL ENVIRONMENTAL LAW AND ENVIRONMENT-RELATED INSTRUMENTS: TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT, REPORT OF THE SECRETARY-GENERAL.....	1046

17. INTERNATIONAL HUMANITARIAN LAW

<i>LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS</i> , ADVISORY OPINION, 8 JULY 1996, INTERNATIONAL COURT OF JUSTICE.....	1089
CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND.....	1090
GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD.....	1091
PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS	1094
<i>PROSECUTOR V DUSKO TADIĆ A/K/A 'DULE'</i> , DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION OF 2 OCTOBER 1995, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.....	1098
TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS	1100
KENNETH WALTZ, 'THE SPREAD OF NUCLEAR WEAPONS: MORE MAY BETTER'	1102
JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, WITH CONTRIBUTIONS BY CAROLIN ALVERMANN, KNUT DÖRMANN AND BAPTISTE ROLLE, <i>CUSTOMARY INTERNATIONAL HUMANITARIAN LAW</i>	1103

Figures

1.1	Descriptive and prescriptive judgments	20
1.2	The state and the interstate system	24
1.3	Legal order	27
1.4	International law – interstate system – international relations	38
2.1	The establishment of international custom	70
2.2	A distinctive look at the basics of the binding force of sources of international law	83
2.3	Application of norms under the <i>lex posterior</i> or <i>lex specialis</i> principle	89
2.4	Peremptory norms of general international law	98
3.1	The complex content of aggression	146
3.2	The bipolar system among states during the Cold War	168
4.1	The mainstream version of the distinction between <i>de facto</i> and <i>de jure</i> recognition	220
5.1	The Holy See's and Vatican City's international status	288
6.1	Stages (phases) of the conclusion of an international treaty	326
6.2	The grounds for relative or absolute invalidity	342
7.1	The United Nations system	382
7.2	The EU ordinary legislative procedure	412
8.1	The pillars of the human rights concept	468
8.2	The complex international system of human rights	477
9.1	The purposes and forms of state responsibility	553
10.1	Three types of jurisdiction	597
10.2	Sovereignty, territorial sovereignty, jurisdiction, and territorial jurisdiction	602
10.3	International crime and crime of international nature	612
10.4	The principle of party autonomy	617
11.1	The distinction between diplomatic and consular relations	650
11.2	The holders of diplomatic privileges and immunities	664
11.3	The composition of the consular post	677
13.1	Maritime zones	773
13.2	Passage regimes	788
13.3	Delimitation of maritime zones – archipelagic state	791
14.1	Freedoms of the air	836

14.2	Definition of terrorism	847
14.3	The concepts of the province of mankind, the natural reserve devoted to peace and science, and the common heritage of mankind	851
14.4	Differences in the regimes of international air law and space law	860
15.1	The five institutions of the World Bank Group	899
15.2	The legal basis of the WTO system	907
15.3	The ICSID institutional facility	940
16.1	Defining the areas (branches) of international law	968
16.2	Defining 'environment'	988
16.3	UN Sustainable Development Goals – SDGs	999
17.1	Combatants, non-combatants, and civilians	1060
17.2	Basics of modern international humanitarian law	1061
17.3	Challenges concerning nuclear weapons	1070
17.4	The approach of international law to non-international armed conflicts	1079
17.5	The third Protocol emblem	1085
17.6	The complex framework of international law concerning armed conflicts	1088

Preface

This book is the product of decades dedicated to academic activity at the Ivane Javakhishvili Tbilisi State University. Time, personal experience, and empirical evidence all serve as a proof that innovative types of textbooks, which attempt to present the subject to a reader in a wide variety of perspectives and ways, make the study of the general course in international law a much simpler and more enlightening a journey.

Therefore, to make the book even friendlier to the students and would-be readers, the following format has been selected:

- The book's architecture is based on the proven approach according to which general issues are discussed at first and then the separate areas of international law;
- Subtitles are assigned to the parts of the sections and subsections of the book in order to highlight each topic of particular interest in the book;
- At the beginning of each chapter, the reader will discover not only the headings of the sections and subsections, but also the subtitles of the topics discussed in the chapter, with reference to the pages;
- On the first page of each section and subsection, a list of essential terms and respective sources of international law can be found, which are further discussed in the text that follows and are also linked to the Index at the end of the book;
- Footnotes are designed in accordance with the generally accepted rules of academic writing. In addition, non-conventional but essential approaches to particular subjects, which provide a broad perspective to a reader as well as a wide array of alternative viewpoints on topics discussed, are also presented in the footnotes. Therefore, the reader should pay particular attention to the footnotes to acquire a broader and a more complete understanding of the topics discussed. Finally, certain articles and paragraphs that are sources of international law and to which the text refers, are clearly indicated to help readers identify the real content of the specific norms.
- Figures in the book are inserted with the intention of facilitating a better understanding of the subject and simplifying the process of comprehension of the materials that might sometimes be confusing;
- At the end of each chapter are annexed the minimal necessary excerpts from cases and materials that were discussed in the chapter. The selected parts of the cases and the materials are displayed without footnotes, which, in certain cases, could have been

an integral part of the original text but are omitted with a specific intent of making these parts of the book more convenient for a reader to follow.

Generally, this book is a guide, with the focal points being the central issues, leading through the labyrinth of the complex world of international law. It will be a faithful assistant for persons interested in comprehending the basic concepts and approaches of the field of international law.

NOTE TO READERS

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. To confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

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CHAPTER 1

The essence of law and the nature of international law

INTRODUCTORY REMARKS	3
Law as a generalised notion	3
The particular angle of the general notion of law presented in this book	4
Introspecting into the specifics of international law	4
LEGAL SYSTEMS	4
Diversity of the legal systems	4
Legal families	5
Civil law family	5
Common law family	5
Customary law family	6
Religious law family	6
Mixed national legal systems family	6
The interplay between the legal families	6
THEORIES OF LAW	6
Primary schools of thought	7
Natural law school of thought	7
The substantive and procedural natural law	7
The substantive or traditional natural law theory	8
The procedural naturalism	8
Two mainstream lines of argumentation	9
The law as the ordinance of reason	10
Legal positivism school of thought	11
Modern legal positivism	12
The different perspectives on the question of the validity of the naturalist and positivist approaches	13
Other theories and approaches	14
Normative theory	14
Law as integrity	16
The complex interaction between the legal approaches	18

THE ESSENCE OF LAW	19
a) <i>The law as a normative system</i>	19
Normative dimension	20
Normative systems	21
b) <i>The law as a systematised body of norms</i>	22
Prescription	22
Ordinary rules or principles	22
Legal right	22
Addressees of legal norms	23
Sources of law	23
Systematised body of norms	23
A key imperative of the legal dimension	23
c) <i>The law as instituted by the state or the interstate system</i>	24
The law as established by the state or interstate system	24
Law as a mirror of the state or interstate system	24
Ordering principles of national and international law	25
Key functions	25
d) <i>The law as applied through the structure which has instituted it</i>	26
Law-applying	26
Legal order	27
Legal responsibility	27
Legal capacity	28
e) <i>The mission of law – to avoid conflicts and to establish civil peace</i>	28
Conflicts	29
Normative systems as the instruments for the avoidance of conflicts	29
Civil peace	29
Primary addressees of national and international law	29
THE NOTION OF INTERNATIONAL LAW	29
DEVELOPMENT OF INTERNATIONAL LAW	30
To the basics	31
The modern sense of international law	31
The issue of terminology	32
New European approach to international law	32
The first wave of modern international law	34
The second wave of modern international law	35
The third wave of modern international law	35
New challenges	36
SPECIFICS OF INTERNATIONAL LAW	38
a) <i>Interstate system</i>	39
A complex web	39
Horizontal model	39
A unique legal position of the superpowers	39
Establishment of law by consent (approval)	40
b) <i>State as the main subject of international law</i>	40
A complex notion of the subject of international law	40

A state as the main subject of international law	40
Other subjects	40
Scope of subjectivity	41
The limited subjectivity of the other subjects of international law	41
Subjectivity of individuals	41
<i>c) Sources and norms of international law</i>	42
The consensual nature of the sources of law	42
The sources of law	42
Complex arrangement of international law	42
<i>d) International law as applied by subjects</i>	43
Application of international law	43
Enforcement system	43
Dispute resolution	43
The application system described here as the only opportunity	44
<i>e) Avoidance of war and institution of peace</i>	44
The mission of international law	44
Avoidance of a third world war	44
Co-operation in various fields	44
The meaning of peace	45
The right to peace	45
CASES AND MATERIALS (SELECTED PARTS)	46

INTRODUCTORY REMARKS

general notion of law
 sources of law
 formal characteristics of law
 legal systems
 national law
 international law
 public international law
 common characteristics of law
 normative phenomena

Law as a generalised notion

In this chapter, the term 'law' shall be understood as a general notion encompassing all legally binding norms (the **general notion of law**) that are reproduced through the **sources of law**. In turn, the sources of law are such predefined forms as particular laws, secondary legislation, and precedents as well as other sources of law, which are precisely predetermined and arranged in each legal system.

The particular angle of the general notion of law presented in this book

This book defines the general notion of law primarily with an emphasis on the **formal characteristics of law** and mainly with the purpose of highlighting the specifics of international law.

Introspecting into the specifics of international law

There are many theoretical models which aim to define the system of rules known as international law. Some of these explanations are outlined in this book, with the intention of making the essence of international law easy to grasp for a would-be reader.

To introspect into the peculiarities of international law, it is necessary to have a clear picture of the following starting points in mind:

- 1 The law is composed of two **legal systems** – **national law** (also referred to as the municipal law, domestic law, or internal law) and **international law** (also referred to as **public international law**).
- 2 As regards national law, it has different appearance in different countries.
- 3 Although there can be no simple answer to the question ‘What is law?’ nevertheless, there are some **common characteristics of law** that unite the law in all its forms, distinguishing it from other **normative phenomena**.

LEGAL SYSTEMS

legal systems
legal families
civil law family
common law family
customary law family
religious law family
mixed national legal systems family
precedents

Diversity of the legal systems

As noted earlier, **legal systems** exist in the form of either national law (encompassing independent national legal systems of the states) or international law. The national law, in its turn, according to the widely recognised generalisation, is made up today of five **legal families**.¹

1 For instance, it is named by Rene David as the family of laws or legal families: ‘[T]he Romano-Germanic family, the Common law family and the family of Socialist law. These three groups, whatever their merits

Legal families

- Civil law family
- Common law family
- Customary law family
- Religious law family
- Mixed national legal systems family

Civil law family

The civil law family stems mainly from Roman law heritage. Its examples vary considerably from country to country. Nevertheless, they also display some shared characteristics. In the civil law family states, the ethos of the positive general rules prevails, manifested primarily in the form of the comprehensive legal codes. In these countries, the law is substantially constituted by the legislature (though other state organs which are empowered to introduce the secondary legislation also participate in the law-making process). At the same time, case law is of secondary importance in these jurisdictions. Germany, France, Italy, and Georgia are examples of countries with a civil law system.

Common law family

The nations of the common law family rather tend to abandon the ethos of generalisation and major codification; in parallel with the statutes, they rely on **precedents** (which are certain judicial decisions that have already been made).² Hence, the law in such countries is to a considerable degree developed by judges moderating between the adversarial parties. The United Kingdom (except Scots law, which on the whole has a mix of the characteristics of the civil law and common law families), Ireland, and the United States (except Louisiana, which also combines elements of both the civil and common law families) represent the common law family.

and whatever their extension throughout the world, do not however take into account all contemporary legal phenomena.' Rene David and John E. C. Brierley, *Major Legal Systems in the World Today* (3rd edn, Stevens & Sons 1985) 22.

2 'In English law, judgments and decisions can represent authoritative precedent (which is generally binding and must be followed) or persuasive precedent (which need not be followed). It is that part of the judgment that represents the legal reasoning (or **ratio decidendi*) of a case that is binding, but only if the legal reasoning is from a superior court and, in general, from the same court in an earlier case. Accordingly, *ratio decidendis* of the *House of Lords are binding upon the *Court of Appeal and all lower courts and are normally followed by the House of Lords itself. The *ratio decidendis* of the Court of Appeal are binding on all lower courts and, subject to some exceptions, on the Court of Appeal itself. *Ratio decidendis* of the High Court are binding on inferior courts, but not on itself. The *ratio decidendis* of inferior courts do not create any binding precedent.' *A Dictionary of Law*, Elizabeth A. Martin (ed) (5th edn, Oxford University Press 2002, reissued with new covers 2003) 374.

Customary law family

In the customary law family countries, certain patterns of behaviour (or customs) are accepted as legal rules of conduct. These are, as a rule, unwritten and are frequently distributed by elders, passed down from generation to generation. Customary law practices can be observed in the mixed national legal systems family countries, where they have combined with the elements of the civil law or common law families. The influence of the customary law family may be seen in some Asian and African nations.

Religious law family

In the religious legal family countries, the law originates from the religious texts and traditions (for instance, nowadays, the Islamic law tradition countries).

Mixed national legal systems family

In the mixed national legal systems family states, two or more of the previously mentioned legal families operate together.

The interplay between the legal families

These different families of national law crosscut each other's boundaries and operate under permanent interaction, sharing each other's experience and, at times, departing from the original trademark characteristics.

THEORIES OF LAW

philosophy of law
natural law legal theory
legal positivism
law of nature
positive law
rule of the reason
The Unanimous Declaration of the Thirteen United States of America
ordinance of reason
just law
legal validity problem
legal realism
critical legal theory
normative theory
law as integrity
divine law

Primary schools of thought

There are two prominent schools of thought in the **philosophy of law** of the Western legacy – **natural law legal theory** and **legal positivism**.

Natural law school of thought

The origination of the natural law legal theory is usually associated with the philosophy of ancient Greece³ and Rome. It was the most influential legal theory in Europe until the rise of legal positivism. Over the long history of its development, numerous authors (in this context, usually labelled as the naturalists) developed a great variety of different approaches and conclusions. Nevertheless, some general characteristics of the natural law approach can still be identified.

In brief, the natural law school of thought distinguishes the **law of nature** (also referred to as the natural law)⁴ from **positive law**. The first is pre-existent to the positive law (the natural law is also regarded as the higher law) and is the universal **rule of the reason** (or a body of the universal and general rules of the reason), which is independent of the will of human authority. In the case of positive law, on the other hand, legal norms are established by the rulers.

The naturalists find the source of the natural law in God, in nature of human (a universalised conception of human nature), or in the idea of justice and, in all cases, refer to reason.

The vital function of the natural law is to establish a valid order as opposed to the arbitrariness of the rulers. At the same time, the naturalists claim that all the legal norms establish a rational standard for conduct, and, by definition, they must be reasonable.⁵

The substantive and procedural natural law

The rule of reason may be discovered either in terms of the substantial meanings (answering the question ‘What shall be the content of the law?’) or procedural understandings (answering the question ‘How is a law made?’).

As prominently articulated by a well-known scholar, Lon L. Fuller (1902–1978), who contributed to the rethinking of the naturalist approach in the twentieth century, ‘we may

3 ‘The philosophers of ancient Greece, where the idea of natural law originated, considered that there was a kind of perfect justice given to man by nature and that man’s laws should conform to this as closely as possible.’ *ibid* 326.

4 In this context, the terms ‘law of nature’ and ‘natural law’ do not refer to the physical laws of nature – the laws that science aims to describe (such as Newton’s so-called laws of motion).

5 As James Leslie Brierly wrote, ‘it has to be admitted that natural law implied a belief in the rationality of the universe which seems to us to be exaggerated. It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning could discover it, and not, of course, that the results to which any and every individual’s reasoning led him was natural law.’ James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, Humphrey Waldock (ed) (6th edn, Oxford University Press 1972) 20.

speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law.⁶

The substantive or traditional natural law theory

According to Thomas Hobbes (1588–1679), the first and fundamental law of nature (he finally enunciates 20 laws of nature which are the precepts or the general rules of reason) stipulates that ‘every man ought to endeavour peace, as far as he has hope for obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war’.⁷ The first branch of the rule contains the first and fundamental law of nature, which is ‘to seek peace and follow it’, and the second branch is ‘the sum of the right of nature, which is: by all means we can to defend ourselves’.⁸

For John Locke (1632–1704), the law of nature is reason in itself (‘reason, which is that law’), ‘stands as an eternal rule to all men, *legislators* as well as others’, and thus represents the will of God (‘of which that is a declaration’).⁹ According to John Locke, the substantial content of the law of nature is to ‘preserve oneself and the rest of mankind’.

The outstanding reflection of natural law theory can be discovered in **The Unanimous Declaration of the Thirteen United States of America** (July 4, 1776):

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.

The procedural naturalism

Lon L. Fuller developed eight ‘principles of legality’, which constitute the ‘inner morality of law’ and, therefore, are placed into the very concept of the law so that no law that fails to meet these standards can be considered valid. Hence, to count as genuine, the rules have to meet the eight minimal requirements cumulatively; namely, they should be:

6 ‘The term “procedural” is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.’ Lon L. Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 96–97.

7 Thomas Hobbes, *Leviathan or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil*, Henry Morley (intro), LL.D., Professor of English Literature at University College, London (2nd edn, George Routledge and Sons 1886) XIV, 66.

8 David Pataria, *Traditional Theoretical Approaches in International Relations* (Jus Press 2017) 55.

9 *Two Treatises of Government by John Locke* (A new edition corrected. published 1821 (MDCCCXXI) by Printed for Whitmore and Fenn and C. Brown) Book II, 191, 305.

- 1 General – reflecting the ‘economic prudence’ to spread the talents of the lawmakers by putting them to work on drafting general rules and not overloading them case by case.
- 2 Promulgated – as the law is established for the application and it is reasonable ‘at least to make available to the affected party the rules he is expected to observe’.
- 3 Prospective – as the law shall be applicable only to future behaviour, not the past, since it is reasonable to assume that a person must, first of all, know the rule to obey it.
- 4 At least minimally clear and intelligible – as the ‘desideratum of clarity represents one of the most essential ingredients of legality’ since it is reasonable that a person must understand the rule to follow it.
- 5 Free of contradictions – since it is reasonable that a person must realise which rule to obey.
- 6 Possible to obey – as ‘a law commanding the impossible seems such an absurdity that one is tempted to suppose no sane lawmaker, not even the most evil dictator, would have any reason to enact such a law.’
- 7 Relatively constant – as the law shall not be subjected to being altered and hanged continuously on an everyday basis, since instability is a challenge which greatly affects obedience to laws.
- 8 Administered in a way that there must be ‘congruence between official action and declared rule’. ‘This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.’¹⁰

Two mainstream lines of argumentation

Thus, among the naturalists discussed earlier, two mainstream lines of argumentation/ thinking on the law of nature can be observed:

- The first line of argumentation views the law of nature in terms of its substantial meaning – as in the case of the classical authors mentioned earlier. Such considerations are mostly focused on the preservation of an individual human or a group of humans or the protection of human dignity or the common good. Accordingly, the morality of law is primarily related to the protection of human life and dignity or the common good. The logical assumptions of the naturalists are sometimes applied to the so-called ‘state of nature’, which is a condition in which society exists ‘without a fear for the common power’ (e.g. has not yet constituted a state).¹¹

10 Fuller (n 6) 49–81.

11 For example, ‘Thomas Hobbes does not argue that the mankind has experienced as a common developmental stage a historically universal existence in the state of nature described by him, however, he is certain that some societies existed in the same state of nature in his age. To give more weight to his arguments, he brings the example of the savage tribes in America, whose manner of existence, in his opinion, was brutish. In addition, he argues that the state of the human existence in the state of

- The second line of argumentation views the law of nature in terms of its ‘procedural’ meaning – as in order to become a law, the norms should cumulate/possess the valid (procedural) characteristics of law.¹²

The law as the ordinance of reason

Thomas Aquinas (1225–1274) was convinced that the law ‘is nothing else than an **ordinance of reason** for the common good, made by him who has care of the community, and promulgated.’¹³

Many naturalists share the conclusion that the law is an ordinance of reason, the fundamental pattern of which is composed by the law of nature.¹⁴ Accordingly, for naturalists all positive legal norms shall be practically reasonable and be in synchrony with the law of nature. Otherwise, they are not law. At the same time, it is practically reasonable in itself to establish a ‘rational’ standard constraining human behaviour in relation to other human beings and vice versa.

In general, the comprehension of the law as the ordinance of reason opens the door for morality by recognising the maxim that what is reasonable (for all humans) is, at the same time, synchronised with morality.

In substantial terms, the morality of law was often disclosed by the so-called classical naturalists in the protection of human life and dignity or the common good. Hence, in such a version, the natural law legal theory overlapped with the so-named natural law moral theory. Sometimes, the classical naturalists also referred to the concept of ‘**just law**’ deduced from natural law and proclaimed the well-known formula ‘an unjust law is no law at all’.¹⁵

nature can easily be observed during a civil war; by observing the human existence without a fear for the common power and the degeneration of the lives of people accustomed to live under the peaceful government.’ Patarraia (n 8) 52.

12 However, a dilemma arises as to why the society should maintain the order established even by the ideally arranged law-making process, when the material norms of law do not comply with the substantial natural law. Therefore, the cogitation on the idea of law developing some procedural characteristics of the valid law – for instance, the ‘principles of legality’ presented in this chapter, accordingly, such conditions as the promulgation and clarity of law, the possibility of obeying the law, and so forth – from the viewpoint of the substantive naturalists, might be significant but certainly are not sufficient prerequisites to establish the legal order which is harmonised with the natural law.

13 J. Budziszewski, *Commentary on Thomas Aquinas's Treatise on Law* (Cambridge University Press 2014) 53.

14 Some of them demonstrated a more complex interplay of the appearances of law; for example, by distinguishing, in addition to the law of nature and positive law, divine law. ‘Aquinas identified four different kinds of law: the eternal law, the natural law, the divine law, and human (positive) law. . . . According to Aquinas, (genuine or just) positive law is derived from natural law.’ Brian Bix, ‘Natural Law Theory’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing Ltd 2010) 213.

15 ‘A more reasonable interpretation of statements like “an unjust law is no law at all” is that unjust laws are not laws “in the fullest sense.” . . . This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is “not really law”

The morality of law was prominently expressed by John Finnis (born 1940), a famous contemporary naturalist: '[N]o theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.'¹⁶

As it is mentioned earlier, natural law itself is considered by naturalists as the domain of reason. Hence, introspection into the essence of the law of nature is the process of rational thinking ('the best human reasoning') and the making of a logical chain of conclusions (in the case of many classical naturalists, the drawing up of a logical chain of deductions from the assumption acknowledged as a fundamental rule of reason). Besides, in order to identify a material norm as a rule of natural law, writers often pay attention as to whether the precept is combined with the value-laden adjectives like 'inherent', 'inalienable', 'essential', 'fundamental', or 'natural'.

The field in which authors commonly detect substantial natural norms is human rights. As James Leslie Brierly (1881–1955), an outstanding international lawyer, noted, by referring to certain fundamental, inherent, or natural rights, the '[w]riters differ in enumerating what these rights are, but generally five rights are claimed, namely self-preservation, independence, equality, respect, and intercourse.'¹⁷

Finally, it is noteworthy that the perpetuity of the law of nature was traditionally considered a crucial characteristic. However, over time, some authors theorised on the possibility of developing the law/laws of nature together with the corresponding evolution of the source, which the authors regarded as the originator of such law/laws. Nevertheless, in classical and pure terms, natural law must be discovered as an eternal rule, and only such material or 'procedural' rule (or rules) of reason which may be comprehended as being perpetual shall be referred to as the rule (or rules) of the law of nature.

Legal positivism school of thought

The legal positivism school of thought saw its rise to prominence sometime later. Since the early nineteenth century, natural law assumptions and deductions have been strongly challenged by the new approach, primarily stemming from the writings of such prominent thinkers like Jeremy Bentham (1748–1832) and John Austin (1790–1859). According to Jeremy Bentham:

Right . . . is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters.¹⁸

may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with "higher law." *ibid* 214.

16 John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 3.

17 Brierly (n 5) 49.

18 *The Oxford Dictionary of Quotations*, Elizabeth Knowles (ed) (5th edn, Oxford University Press 2001) 2.91.

‘The term “positivism” derives from the Latin *positum*, which refers to the law as it is laid down or posited. Broadly speaking, the core of legal positivism is the view that the validity of any law can be traced to an objectively verifiable source.’¹⁹

For the classical positivist thinkers, a rule may be considered a law when it comes from a recognised authority and can be enforced by the very authority that issued it (for example, according to Austin, laws are the commands of the sovereigns backed up with the threat of a sanction), such as a king, a parliament, or any ruler who has legislative power within a particular defined territory.

Positivists generally claim that the law is ‘a matter of social facts’ (which can be explained ‘that the laws of a society exist and have meaning if and only if human beings create them and give them meaning’) and does not necessarily have a moral character.²⁰

Consequently, the positivist thinkers distinguish law from morality. They argue that as long as it was passed validly, even an ‘immoral’ law is a law, albeit a ‘bad’ law. This premise does not mean that the positivist writers are not critical of the merits of the laws. Jeremy Bentham, for instance, was a positivist who criticised ‘bad’ laws. However, his criticism was not about the validity of such laws.²¹

Modern legal positivism

As was articulated by Herbert Lionel Adolphus Hart (1907–1992), a remarkable positivist writer of the twentieth century, ‘we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.’²²

He criticised the standpoint of naturalists and ‘the claim that laws of proper conduct may be discovered by human reason’ and argued that the norms of law which ‘require men to behave in certain ways’ are prescriptive in nature, in contrast to the laws which

19 Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (2nd edn, Oxford University Press 2014) 25.

20 ‘The first is the *social fact thesis*: what constitutes the law in a certain society is ultimately a matter of social facts – facts about the mental states and behavior of certain individuals. Put more simply, the social fact thesis states that the laws of a society exist and have meaning if and only if human beings create them and give them meaning. The second thesis . . . is the *separability thesis*: there is no necessary connection between law and morality. . . . For many years, the social fact and separability theses jointly defined the position known as *legal positivism*, but in the late twentieth century, positivists began to abandon separability, leaving the social fact thesis as their sole defining thesis.’ Jeffrey Brand, *Philosophy of Law Introducing Jurisprudence* (Bloomsbury 2013) 5.

21 ‘The arch-positivist of the modern era, Jeremy Bentham, was a dedicated social reformer who forcefully attacked the laws of England throughout his life. In doing so, however, he attacked them as bad laws, and did not claim that they were non-laws because they were bad.’ Stephen Guest, Adam Gearey, James Penner, and Wayne Morrison, *Jurisprudence and Legal Theory* (University of London Press 2004) 64.

22 HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 185–186.

'formulate the course or regularities of nature' and which can be detected by observation and reasoning.²³

As a positivist author, Hart paid particular attention to the structure of (positive) law and the legal rules. He enumerated the three so-called 'defects' of the regulations in the 'simple form of social life'; namely, uncertainty, static character, and inefficiency. 'The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules'.²⁴ The primary rules, he said, govern conduct; the secondary rules, in turn, prescribe the procedural methods by which the primary rules 'may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined'.²⁵ Such secondary rules consist of the rules of recognition, the rules of change and the rules of adjudication.²⁶

With the identification of these types of rules, Hart aimed to reflect the comprehensive system of law and to elaborate a more accurate approach to the validity of law. In the end, he found the source of the validity of the primary rules in the rules of recognition.²⁷

The different perspectives on the question of the validity of the naturalist and positivist approaches

Thus, one of the critical issues which gives impetus to a confrontation between these two schools of thought concerns the **legal validity problem**: namely,

23 '[P]rescriptive laws may be broken and yet remain laws, because that merely means that human beings do not do what they are told to do; but it is meaningless to say of the laws of nature, discovered by science, either that they can or cannot be broken. If the stars behave in ways contrary to the scientific laws which purport to describe their regular movements, these are not broken but they lose their title to be called "laws" and must be reformulated.' *ibid* 187.

24 *ibid* 94.

25 *ibid*.

26 The rule of recognition 'is accepted and used for the identification of primary rules of obligation.' 'In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources or suggested sources of law.' The rule of change 'empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules.' Finally, the rules of adjudication are provided 'to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. . . . Besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed.' *ibid* 95–97, 100–101. The secondary rules are identified in the Constitutions or other legislation (for example, the rules of adjudication, in addition, are reflected in the so-called processual codes) of certain countries.

27 'There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.' *ibid* 116.

- Is it just a matter of the source of the norm ('an objectively verifiable source'), as is assumed by the positivist thinkers? or
- Is it about the content of the norm (to be in synchrony with the substantive natural law) or the valid law-making process (to be in synchrony with the procedural natural law), as is assumed by the representatives of the natural law school of thought?²⁸

Other theories and approaches

In the philosophy of law, in parallel with the mainstream schools of thought, other more or less influential theories of law were developed, such as **legal realism**,²⁹ **critical legal theory**,³⁰ and so forth.

Normative theory

One of the most outstanding other approaches is the so-called '**normative theory**' developed by Hans Kelsen (1881–1973), the famous Austrian jurist and philosopher, who elaborated the 'pure theory of law', which shares some essential aspects with legal positivism (for example, with an emphasis on positive forms of law, the separability thesis which assumes that there is no necessary connection between law and morality). However, at the same time, the pure theory of law is a unique approach since it is based on the ethos of a pure normative model, which founds the validity of every norm of a legal system on the higher norm and ultimately arrives at the realm of presupposition (the basic norm, which 'is a hypothesis and a wholly formal construct').³¹

Kelsen recognised that

[a]ll laws are created by human actions, but human actions are facts and they belong to the realm of the 'is,' whereas laws are norms and belong to the realm of the 'ought.' It is another of Kelsen's unquestioned beliefs that there is an unbridgeable gap between the 'is' and the 'ought'; that norms cannot derive their existence from facts.³²

28 It must be made clear that the naturalists also did not exclude the power of the rulers to make positive laws; however, the source of validity for positive laws were found in natural law.

29 'There are two "schools" of realism: the American and the Scandinavian. While they share certain similarities, they also differ fundamentally in their approach and methodology. . . . In particular, although the American movement was largely pragmatist and behaviourist, emphasizing "law in action" (as opposed to legal conceptualism), the Scandinavians were preoccupied with mounting a philosophical attack on the metaphysical foundations of law.' Wacks (n 19) 108.

30 'The most general statement of critical legal theory was the slogan, "Law is politics".' *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Martin P. Golding and William A. Edmundson (eds) (Blackwell Publishing 2005) 80.

31 Wacks (n 19) 41.

32 Joseph Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19(1) *The American Journal of Jurisprudence* 96.

Therefore, he concluded that ‘the objective validity of a norm . . . does not follow from the factual act, that is to say, from an *is*, but again from a norm authorizing this act, that is to say, from an *ought*.’³³

Hence, according to the pure theory of law, norms possess a validity when they are derived from higher norms existing at hierarchically higher levels. These latter norms, again, obtain their validity in a similar way, and so forth until touching the basic norm (in German – *Grundnorm*), whose validity can no longer be obtained from the normative delegation but has to be presupposed. In other words, ‘[s]ince the actual, legal, chain of validity comes to an end, we inevitably reach a point where the “ought” has to be presupposed, and this is the presupposition of the basic norm.’³⁴

On the other hand, there is a need to find the right connection between the national legal system of a given state and international law, since Kelsen was convinced that ‘there can be just one normative system and just one basic norm’³⁵ of a given country. (‘No one can serve two masters,’ pointed out Kelsen.)

However, there can be ‘two monistic constructions’ – (1) ‘international law which from the viewpoint of the primacy of national law is regarded as merely a part of national law’ and (2) ‘international law which from the viewpoint of the primacy of the international legal order is regarded as a legal order superior to all national legal orders delegating these legal orders.’

For the first, starting from the validity of a national legal order, the reason for the validity of international law [as well as any particular national legal order] is the presupposed basic norm, according to which the establishment of the historically first constitution of the state is a law-creating fact. For the second, starting from international law, the reason for its validity is the presupposed basic norm, according to which the custom of the states is a law-creating fact.³⁶

At the same time, in Kelsen’s concept, the ‘historically first constitution of the state’ has a complex meaning. He wrote that

the basic norm . . . refers directly to a specific constitution, actually established by custom or statutory creation, by and large effective, and indirectly to the coercive order created according to this constitution and by and large effective; the basic norm thereby furnishes the reason for the validity of this constitution and of the coercive order created in accordance with it.³⁷

33 Hans Kelsen, *Pure Theory of Law*, Max Knight (tr) (University of California Press 1967) 9.

34 ‘At some stage, in every legal system, we get to an authorizing norm that has not been authorized by any other legal norm, and thus it has to be presupposed to be legally valid. The normative content of this presupposition is what Kelsen has called the basic norm.’ ‘The Pure Theory of Law’ (2016) *Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/lawphil-theory/>> accessed 16 March 2021.

35 Raz (n 32) 110.

36 Kelsen (n 33) 339.

37 *ibid* 201.

In sum, Kelsen preferred a monistic picture for every national legal order in which each state had its own unified legal order based on the primacy of international law. Moreover, in addition, he claimed that ultimately, the basic norm's 'validity depends on efficacy'.³⁸ As it was summarised by Kelsen, the '[b]eginning and end of the validity of a national legal order are determined by the legal principle of effectiveness', which is 'a norm of positive international law'.³⁹

Law as integrity

The other authoritative theory originated in the common law world and was developed by a renowned American jurist and philosopher, Ronald Dworkin (1931–2013), who promoted the meaning of '**law as integrity**'.⁴⁰ He elaborated the theory based on the analysis of the cases and the existing discretion of the judges in the decision-making process (mostly in the common law family countries).⁴¹

[P]ositivism generally claims that law consists of rules determined by social facts. Where . . . rules run out [Hard cases], the problem can be resolved only by the exercise of a subjective, and hence potentially arbitrary, discretion. . . . If, however, there is more to law than rules, as Dworkin claims, then an answer may be found in the law itself. Hard cases . . . may, in other words, be decided by reference to the legal materials; there is no need to reach outside the law and so to allow subjective judgements to enter.

Hence,

Dworkin's account of the judicial function requires the judge to treat the law as if it were a seamless web. There is no law beyond the law. Nor, contrary to the positivist thesis, are there any gaps in the law. Law and morals are inextricably intertwined.⁴²

38 Wacks (n 19) 41. 'If the validity of a legal order requires the effectiveness of its basic norm, it follows that when that basic norm of the system no longer attracts general support, there is no law. This is what happens after a successful revolution. The existing basic norm no longer exists, and, Kelsen says, once the new laws of the revolutionary government are effectively enforced, lawyers may presuppose a new basic norm. This is because the basic norm is not the constitution, but the presumption that the altered state of affairs ought to be accepted in fact.' *ibid* 43.

39 Kelsen (n 33) 338, 336.

40 Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press 1986) 94.

41 'Law as integrity asks a judge deciding a common-law case . . . to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be.' *ibid* 238–239.

42 Wacks (n 19) 51, 55.

To demonstrate the 'law as integrity', Dworkin distinguished the rules, principles ('a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality'), and policies ('that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)'),⁴³ which are in the hands of the judges to interpret the law and to apply the appropriate legal sources of law.⁴⁴

As Dworkin argued, '[l]egal systems characteristically generate controversial or hard cases such as these in which a judge may need to consider whether to look beyond the strict letter of what the law is to determine what it ought to be.' Hence, it is critical for the law to be properly applied to implement 'an interpretive process under which individual rights are paramount.'⁴⁵

To answer the question 'Do judges have to have discretion?' Dworkin 'revisited' the naturalist approach and concluded that

judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.⁴⁶

43 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 22. According to Dworkin, some court decisions reveal that, in addition to rules, the law includes principles. For example, he wrote: 'In 1889 a New York court, in the famous case of *Riggs v. Palmer*, had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court began its reasoning with this admission: "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." But the court continued to note that "all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." The murderer did not receive his inheritance.' *ibid* 23.

44 'Dworkin claims that, while rules "are applicable in an all-or-nothing fashion", principles and policies have "the dimension of weight or importance". In other words, if a rule applies, and it is a valid rule, a case must be decided in a way dictated by the rule. A principle, on the other hand, provides a reason for deciding the case in a particular way, but it is not a conclusive reason: it will have to be weighed against other principles in the system. Principles differ from policies in that the former is "a standard to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality". A "policy", however, is "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community". Principles describe rights; policies describe goals.' Wacks (n 19) 55.

45 *ibid* 52, 50.

46 Ronald Dworkin, "'Natural' Law Revisited' (1982) 34(2) *University of Florida Law Review* 165–188.

The complex interaction between the legal approaches

In numerous countries, the positive law approach, which posits that the law comes from an objectively verifiable source, represents the main pattern. This approach is sometimes nourished by the viewpoint from the natural law schools of thought (and in some instances, other theories as well; for example, the normative theory influenced the development of the strong normative hierarchy system in many countries); however, in general, a particular rule of natural law or at least recognition of the law of nature as a source of the law shall be made through the lenses of positive law.

The same applies to international law. The most frequently used sources of international law – treaty and custom – are the expression of positive law. The third source – the general principles of law, which as a source of international law was affirmed in the twentieth century – also should primarily be considered as a form of positive law. However, at the same time, sometimes it may be regarded as an acknowledged open window into the world of natural law. The chapter ahead in this book contains a more detailed examination of this matter.

An example of the implementation of the naturalist approach in international law is the Nuremberg trials of Nazi war criminals, which used the principle that certain acts constitute ‘crimes against humanity’, even if, at the moment they are committed, they do not fall under the specific regulations of the positive law. Nevertheless, this provision was applied to particular persons only after its recognition in the Nuremberg Charter (positive law).⁴⁷

The reflection of the natural law legal theory can be found in many international documents on human rights (for example, the Universal Declaration of Human Rights, the European Convention on Human Rights, and so forth), in which, however, the ‘[n]atural law is conceived of not as a “higher law” in the constitutional sense of invalidating ordinary law but as a benchmark against which to measure positive law.’⁴⁸

Nonetheless, in certain states, other legal approaches prevail. For instance, in the Islamic law tradition (religious law) countries, albeit with some modifications stipulated by the modern era (which are implemented in various proportions in these countries), the concept of **divine law** remains a foundational pattern, which itself is expressed in positive forms, but the rulers have limited power in the law-making process.⁴⁹

47 The Charter of the International Military Tribunal, commonly known as the Nuremberg Charter, which was annexed to and formed an integral part of the London Agreement. The jurisdiction of the Tribunal was defined under Article 6 of the Charter, and Paragraph (c) of this Article recognised the ‘Crimes against humanity’.

48 Wacks (n 19) 14.

49 ‘Two terms are used to refer to law in Islam: Shariah and fiqh. Shariah refers to God’s divine law as contained in the Quran and the sayings and doings of Muhammad (hadith). Fiqh refers to the scholarly efforts of jurists (fuqaha) to elaborate the details of shariah through investigation and debate. Muslims understand shariah to be an unchanging revelation, while fiqh, as a human endeavor, is open to debate, reinterpretation, and change.’ *The Oxford Dictionary of Islam*, John L. Esposito (ed in chief) (Oxford University Press 2003) 148.

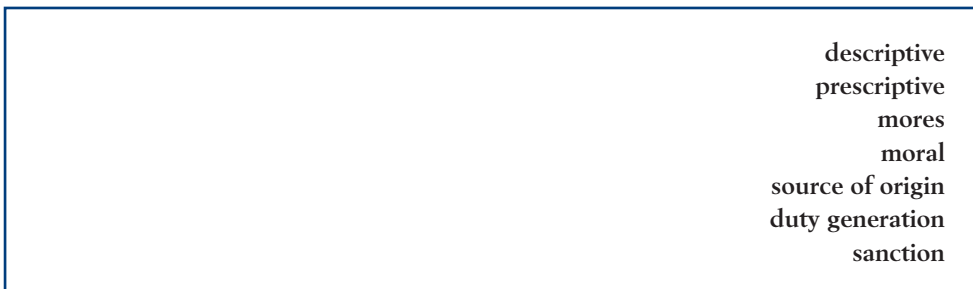
In addition, sometimes the legal systems acknowledge the interpretive power of certain authorities: basically, the courts and arbitral tribunals – for example, the competence to dispense a case based on the principles of fairness and justice. The interpretive power of such authorities varies from country to country and from the legal system to the legal system. However, in any case, it is limited and is usually used if the positive norm applicable to a case is unclear or might fail to resolve the issue adequately for other reasons. In international law, for such competence, the obligatory agreement (consent) of the parties concerned is foreseen, which in itself represents a positive form. This matter will be discussed in detail later in this book.

THE ESSENCE OF LAW

There are many sayings and interpretations concerning the meaning of law, which, due to their inherent sharpness in addressing the essence of law, have been widely popular. To cite the few, the following sayings/interpretations are the sharpest in shedding light on its principal mission:

- ‘An unjust law is no law at all.’ – Thomas Aquinas (1225–1274)
- ‘Laws are the sovereigns of sovereigns.’ – Louis XIV (1638–1715)
- ‘A state is better governed which has but few laws, and those laws strictly observed.’ – René Descartes (1596–1650)
- ‘Where law ends, tyranny begins.’ – William Pitt (1708–1778)
- ‘The law is the last result of human wisdom acting upon human experience for the benefit of the public.’ – Samuel Johnson (1709–1784)⁵⁰

a) The law as a normative system



⁵⁰ *Civilization's Quotations: Life's Ideal*, [compiled] by Richard Alan Krieger (Algora Publishing 2002) 236, 233, 238.

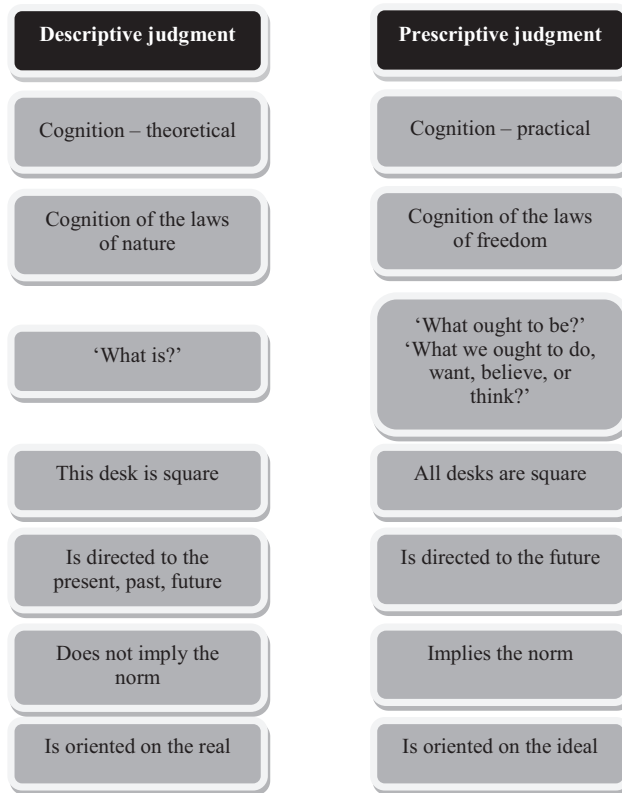


FIGURE 1.1 Descriptive and prescriptive judgments

Normative dimension

For example, ‘prudence, justice, strength, self-control is a virtue.’ – This sentence is normative in nature because it implies that you have to be reasonable, just, firm and restrained. So the question or judgment is formed normatively, if:

- 1 it explicitly or implicitly includes a prescriptive ‘what ought to be?’;
- 2 it determines some norms or standards;
- 3 it is future based, carried out in prescriptive (not in descriptive) format/manner;
- 4 it has an obligatory nature and remains obligatory (‘ought to be’, ‘must’) even in cases when the prescriptive rules are not followed. If prescriptive suggestions are not fulfilled, that will not imply the same scientific results which entail non-confirmed experiments in the natural sciences;
- 5 it is evaluative.⁵¹

51 Pataraia (n 8) 35.

Normative systems

The normative systems manifest the social rules of conduct established with the aim of prescribing norms regulating coexistence between humans.

Multiple varieties of the normative systems exist – for example, such particular arrangements as the rules of a game or a language or such systematised bodies of norms as **moral**, **mores**, and **law**, which establish the general rules of conduct in a society.

Each normative system can be comprehended and distinguished by answering questions about:

- 1 the **source of origin** (authors usually refer to a god, a human, a society, and so forth);
- 2 **duty generation** (from the outside or internally);
- 3 the category of **sanction**.

Consequently, significant differences can be detected between the normative systems. For instance, if regarding the moral, essentially, duty generation (which stipulates the fulfilment of norms) proceeds internally in an individual; concerning the law, as well as the mores, a duty is predominantly generated from the outside.⁵²

Hans J. Morgenthau, a prominent thinker of ‘political realism’ (which is one of the most influential theories on international relations), for example, first, enumerated only three types of normative systems regulating the conduct ‘in all higher societies’ and secondly, identified sanctions as the distinguishing characteristic between them. He outlined:

Three types of norms or rules of conduct operate in all higher societies: ethics, mores, and law. Their distinctive characteristics have been much debated in the literature of philosophy and jurisprudence. For the purpose of this study it is sufficient to point out that every rule of conduct has two elements: the command and the sanction. No particular command is peculiar to any particular type of norm – ‘thou shalt not kill’ can be a command of ethics, mores, or law. It is the sanction that differentiates these three different types of rules of conduct. . . . If A kills B and afterward feels pangs of conscience or of remorse, we are in the presence of a sanction peculiar to ethics and, hence, of an ethical norm. If A kills B and unorganized society reacts with spontaneous demonstrations of disapproval, such as business boycott, social ostracism, and the like, we have to do with a sanction peculiar to the mores, and, hence, to a norm of the mores. If, finally, A kills B and organized society reacts in the form of a rational procedure with predetermined police action, indictment, trial, verdict, and punishment, the sanction is of a legal nature and the norm, therefore, belongs in the category of law.⁵³

52 See a wide variety of possible theoretical models and alternative explanations on this matter in Pataraiia (n 8) 32–33.

53 Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (7th edn, revised by Kenneth W. Thompson and W. David Clinton, McGraw-Hill 2006) 236.

b) The law as a systematised body of norms

norm
rules and principles
legal right
sources of law
hierarchy of sources
complex arrangement of international law
key imperative of the legal dimension

Prescription

Every **norm** prescribes a rule of conduct (action). Therefore, the norm is a founder of the standards accordingly either of right and wrong (e.g. rules of the game), good and evil (moral) or lawful and unlawful (law).

Ordinary rules or principles

Legal norms appear in the form of either ordinary rules or principles.⁵⁴ Both legal rules and legal principles are legal norms because they both suggest what ought to be in legal terms. Nevertheless, there is a difference between legal rules and principles:

- In the case of legal principle, a norm has a general nature and represents a generalised standard (perspective) for an undetermined number of cases that imply the application of the general norm. In addition, a legal principle also provides guidance for the interpretation or application of a legal rule.
- On the other hand, in respect of legal rule, the norm of conduct is applicable only in well-predetermined circumstances and refers to only particular legal relationships (case).

Legal right

There is no **legal right** without the law. The legal norms determine rights and obligations. Every right includes the obligation (of another person/persons) in itself.

⁵⁴ In international law, this distinction has become conventional. The formulation 'rules and principles of international law' is emphasised in many international documents and in the approaches of the International Court of Justice as well. See the Court's Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004 (ICJ Reports 2004, 136), for example, Paragraph 114. All ICJ cases are available at <www.icj-cij.org/en/list-of-all-cases>.

Addressees of legal norms

Mostly, legal norms represent the rule of conduct (1) for an unlimited number of persons and (2) for multiple applications. However, legal norms do not always appear to have such a nature – for example, the norms established by an ‘individual legal act’, which are intended for one-time application⁵⁵ and the norms defined by the bilateral international treaty, which are valid only for the parties to the treaty concerned.

Sources of law

Legal norms are presented in pre-defined formats (forms), which are named the ‘sources of law’.

In formal terms, the sources of law are the forms which can be perceived by the human senses and which take shape either as a binding custom (e.g. international custom) or in any other legal format – such as laws, edicts, decrees, rescripts, orders, ordinances, statutes, resolutions, rules, judicial decisions, and the list can be continued further.

Systematised body of norms

Sources and norms of law are ordered in the system of:

- **Hierarchy** (in national law)
- **Complex arrangement** (in international law)

First, the complex arrangement of international law concerns the sources of law and reflects the framework where all of them are placed at the same level without normative hierarchy. However, there are other ordering models in relation to the legal norms of international law regardless of the forms (sources of law) in which they are allocated. These models manage the priority and validity matters in the non-hierarchical system of sources of law. The peremptory and dispositive norms in international law represent one such model. A more detailed description of the complex arrangement system will be provided later in this book.

A key imperative of the legal dimension

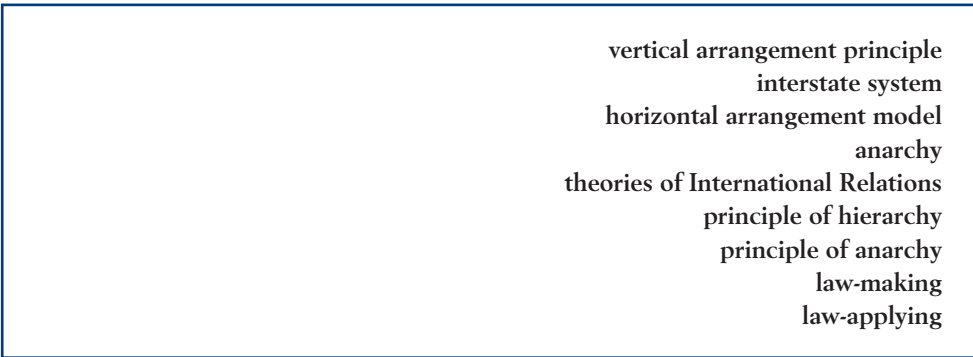
Meanwhile, for the legal approach, the principal objective is the implementation of the norms holding legal validity. ‘**Legal norms are to be kept**’ – this is the **key imperative of the legal dimension**: that is to say, a self-sufficient imperative.

At the same time, as suggested earlier, determination of the legal validity *per se* depends on the legal approach one supports. Accordingly, the positivists find validity to be located in an objectively verifiable source; the followers of the law of nature approach in the compliance of a norm with requirements of the (substantive or procedural) law of nature; the

55 For instance, Article 2 (Concept and types of legal acts) of the Law of Georgia on Normative Acts.

advocates of the normative theory in the higher norms existing at hierarchically higher levels; the divine law countries in the will of the God, and so forth. However, if a legal norm possesses legal validity, it shall be respected. Hence, in the legal dimension, the effectiveness of a legal norm is preferred over chaos.

c) The law as instituted by the state or the interstate system



The law as established by the state or interstate system

The law is the body of norms which is developed by the social constructs (structures) named as the ‘state’ or the ‘interstate system’.

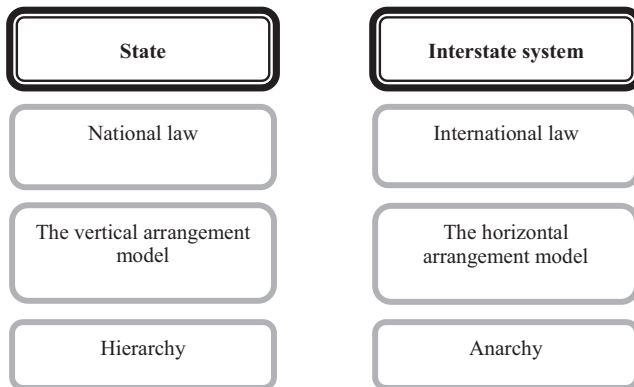


FIGURE 1.2 The state and the interstate system

Law as a mirror of the state or interstate system

Law reflects the structure in which it is established and mirrors the arrangement model of a state or the interstate system.

A state is a complexly interlinked structure which basically is erected on a **vertical arrangement principle** with an implied presence of hierarchy and subordination.

Unlike a state, the **interstate system** is grounded on the model of independent states with no central authority above them (**horizontal arrangement model**). Hence, this model in the International Relations⁵⁶ theory is called **anarchy**. In the state of anarchy, there is no hierarchy (supreme authority). Moreover, the state of anarchy is a crucial theoretical tenet for the mainstream **theories of International Relations**.

Ordering principles of national and international law

Therefore, the sources of national law are built on the **principle of hierarchy**, while the sources of international law are arranged on the **principle of anarchy**.

It means that:

- The sources of national law are arranged according to the position in the system of the authority that has adopted them.
- The sources of international law are ordered in the complex arrangement system, but there exists no hierarchy between them.

Key functions

An arrangement model of a system in which and through which the law is instituted corresponds to the disposition of the functions [concerning the law] in this system. The key functions are commonly understood to include:

A Law-making dimension/function

- 1 Standards-developing function – the so-called legislative function, which, along with the establishment of the ordinary rules of interaction, allocates governmental power in society.

B Law-applying dimension/function

- 2 Order-maintaining function – ‘to control . . . [subjects] by coercion and threats of coercion so as to maintain peace and order.’⁵⁷
- 3 Order-restoring function – ‘to adjust actual conflicts once they have broken out. Here the goal is to restore the peace and order of the ordering framework rather than to maintain it.’⁵⁸

In states, these principal functions are distributed between state authorities.

- 1 The legislative function is performed by the state authorities recognised by the legal system of a given country to introduce and modify the legislation.
- 2 The order-maintaining function usually is exercised by the executive branch of government.

⁵⁶ International Relations – the academic discipline of international relations.

⁵⁷ David A. Funk, ‘Major Functions of Law in Modern Society Featured’ (1972) 23(2) *Case Western Reserve Law Review* 282.

⁵⁸ *ibid* 283–284.

- 3 The order-restoring function is primarily fulfilled by the judiciary system, which aims to dispense justice. The exercise of the order-restoring function also includes adjusting disputes between private parties (the natural and legal persons), private parties and public officials or state authorities, as well as when only officials and/or state authorities are involved in the conflict (for instance, the conflicts regarding the allocations of governmental power). There are many types of conflicts which can and should be resolved through the fulfilment of the adjudicative function, including conflicts related to the interpretation of legal norms. However, in addition to the courts, the arbitral tribunals are also usually involved in the exercise of the adjudicative function, as well as empowered administrative agencies (for example, in certain states, the so-called independent regulatory bodies).

Thus, the implementation of law-making and law-applying functions within the states is primarily accommodated on hierarchical (inherently centralised) arrangement model, in the sense that in every state, there is the hierarchy between the state organs performing each of the aforementioned powers. Namely, in numerous countries, the parliament is the supreme legislative body and, hence, the supreme authority concerning the law-making function; the government, on the other hand, possesses the supreme responsibility for maintaining order and so forth.

In contrast, in the interstate system, the exercise of law-making and law-applying functions by the subjects of interstate interaction is realised in a decentralised manner (each subject is both a lawmaker and 'an arm of the law'), reflecting the horizontal arrangement model of organisation in the interstate system.

d) The law as applied through the structure which has instituted it

legal order
 legal responsibility
 legal sanctions
 nullity
 criminal sanctions
 remedies
 legal capacity

Law-applying

The structure (state or interstate system) not only institutes but also directs the application of the law.

As outlined earlier, law-applying refers to all the mechanisms which contribute to the maintenance and restoration of legal order.

In states, law-applying usually refers to the activity of state bodies or officials through which they establish, change, and abolish the legal rights and duties of natural or legal

persons, as well as the state bodies and officials themselves, or resolve questions about applying the legal responsibility for violation of the legal norms.

However, law-applying is a rather complicated undertaking since, in everyday life, natural or legal persons also voluntarily obey the legal norms regardless of any command from the executive or judiciary bodies. As remarkably outlined by Herbert Lionel Adolphus Hart: 'The power thus conferred on individuals to mould their legal relations with others by contracts, wills, marriages, &c., is one of the great contributions of law to social life.'⁵⁹

Hence, in this chapter, law-applying includes all the forms of the implementation of legal rights and obligations.

Legal order

Without application, the law is the mere combination of words fully distanced from its core objective of establishing the **legal order**.

As famously emphasised by Thomas Hobbes: '[T]he laws are of no power to protect them without a sword in the hands of a man, or men, to cause those laws to be put in execution.'⁶⁰ The same idea in the words of Thomas Fuller finds the following expression: 'Law cannot persuade where it cannot punish.'⁶¹

Therefore, a formula can be introduced which says that the establishment of a legal order by the legal norms can only happen after their application: Law + Law-applying = Legal norms in action = Legal order



FIGURE 1.3 Legal order

Legal responsibility

There are differences between law-applying and the application model of other normative systems, which to a significant degree determine the specifics of law. One important difference is the system of **legal responsibility**, which grants the law its specific obligatory and effective nature.

Thus, the addressees of law have to adhere to and comply with the norms of law. Otherwise, they will be subjected to the **legal sanctions**, such as the (legal) **nullity** of a legal relationship

59 Hart (n 22) 28.

60 Hobbes (n 7) XXI, 101.

61 *Civilization's Quotations: Life's Ideal* (n 50) 236.

(for instance, the nullity of marriage) or a legal norm;⁶² the **criminal sanctions** (also called the penal sanctions), **remedies**⁶³ (for example, the civil or administrative remedies), and so on, which are the guarantying mechanisms of the legal responsibility system. As prominently articulated by Herbert Lionel Adolphus Hart, ‘centrally organized effective system of sanctions . . . are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not.’⁶⁴

Legal capacity

Meanwhile, legal responsibility may be introduced only against persons who possess **legal capacity** (‘power to create or enter into a legal relation under the same circumstances in which a normal person would have the power to create or enter into such a relation’)⁶⁵ and are liable to legal sanctions since not every person can be regarded as a person bearing legal responsibility (for example, a child).

e) The mission of law – to avoid conflicts and to establish civil peace

conflicts
reasons for the conflicts
absence of equal opportunities
conflicts of interest
civil peace

62 ‘NULLITY. . . . In a figurative sense, and in law, it means that which has no more effect than if it did not exist, . . . nullities have been divided into absolute and relative. Absolute nullities are those which may be insisted upon by any one having an interest in rendering the act, deed or writing null, even by the public authorities, . . . Relative nullities can be invoked only by those in whose favor the law has been established’. Nam H Nguyen, *Essential 25000 English Law Dictionary*, 15791 <<https://bit.ly/3h5euKQ>> accessed 16 March 2021. ‘absolute nullity. Civil law. 1. An act that is void because it is against public policy, law, or order. – The nullity is noncurable. It may be invoked by any party or by the court. . . . relative nullity. Civil law. 1. A legal nullity that can be cured by confirmation because the object of the nullity is valid. The nullity may be invoked only by those parties for whose interest it was established. . . . 2. The state of such a nullity.’ *Black’s Law Dictionary*, Bryan A. Garner (ed in chief) (9th edn, Thomson Reuters 2009) 1173.

63 ‘remedy (redress. relief) n. Any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for their infringement. A civil remedy may be granted by a court to a party to a civil action.’ *A Dictionary of Law* (n 2) 423.

64 Hart (n 22) 198.

65 ‘specif, the satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one’s ability to sue or be sued, to enter into a binding contract, and the like’, *Black’s Law Dictionary* (n 62) 235.

Conflicts

Conflicts accompany the coexistence of human beings. The **reasons for the conflicts** are many, but the primary source lies within the human being itself, including the inherent **absence of equal opportunities** and **conflicts of interest** stemming from the limited resources to satisfy human aspirations and desires.

Normative systems as the instruments for the avoidance of conflicts

The normative systems help avoid and check conflicts.

The normative systems are established universally in every social setting where humans interact. Starting with the family, which is the first unit of social order, continuing with the educational or working communities, and finishing with a state, which itself is a sizeable social structure made up of small and large substructures, humans tend to establish and develop norms and place them in a distinctive system to ensure rules are followed.

Civil peace

Consequently, every normative system has a particular significance and influence over the lives of human beings. Nevertheless, because of the apparent effectiveness of its application model, the law is the most effective way to establish **civil peace**.

Primary addressees of national and international law

National law regulates the interaction of the state, other legal (juridical) persons, and natural (physical) persons. However, natural persons (human beings) are the primary addressees of national law.

International law refers to many structures (entities) of the interstate system, including states; however, its primary concern is the legal regulation of the international interaction between states.

Hence, national law exists for humans, international law for states.

THE NOTION OF INTERNATIONAL LAW

Among the many famous definitions of international law widely accepted in academia, some of them are presented below to the attention of the reader:

- [T]he law of nations is originally no other than the law of nature applied to nations.' – Emer de Vattel (1714–1767)⁶⁶

⁶⁶ 'This is the law which Grotius, and those who follow him, call the internal law of nations, on account of its being obligatory on nations in point of conscience. Several writers term it the natural law of nations.' Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Béla Kapossy and Richard Whatmore (ed and intro), Thomas Nugent (tr) (Liberty Fund, Inc. 2008) 68

- 'Law of Nations or International Law (*Droit des gens, Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other.' – Lassa Francis Lawrence Oppenheim (1858–1919)⁶⁷
- '[T]he norms designated as "international law" are really "law" in the same sense as national law.' – Hans Kelsen⁶⁸
- 'Public international law covers relations between states in all their myriad forms, from war to satellites and from trade to human rights, and regulates the operations of the many international and regional institutions.' – Malcolm N. Shaw (born 1947)⁶⁹

DEVELOPMENT OF INTERNATIONAL LAW

Renaissance
 multi-centric state system
 Peace of Westphalia
 universalism
 law of nations
 Francisco de Vitoria
 Francisco Suárez
 Alberico Gentili
 Hugo Grotius
De Jure Belli ac Pacis
 Samuel von Pufendorf
 Richard Zouche
 Emer de Vattel
 Reformation
 first wave of international law
 Hague Peace Conferences
 First World War
 second wave of international law
 League of Nations
 Kellogg-Briand Pact
 Second World War
 third wave of international law
 United Nations Organisation
 non-state actors

67 L. Oppenheim, *International Law: A Treatise, Vol. I: Peace* (1st edn, Longmans, Green and Co 1905) 3.

68 Hans Kelsen, *General Theory of Law & State*, A. Javier Trevino (intro) (Transaction Publishers 2006) 328.

69 Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017) 2.

Cold War
Decolonisation
web of international governmental organisations
human rights
United Nations Conference on the Human Environment
globalisation
information revolution
cybersecurity
COVID-19
global problems

To the basics

The basics of the law prescribing the relations among nations were designed during the European **Renaissance**.⁷⁰ However, many scholars travel further back in history to trace the roots of this law. For example, scholars concentrate on the co-operative agreements between peoples of the ancient Middle East; the profound cultural traditions of ancient Israel, the Indian subcontinent, and China; the prominent political philosophy of ancient Greece and the relations between the Greek city-states; and the rich political and legal legacy of the Roman Empire.

The modern sense of international law

However, in the modern understanding, international law cannot arise in a space without a **multi-centric state system** and the interaction of more or less equal actors.

Consequently, for example, the Roman Empire's *jus gentium*⁷¹ and modern international law cannot in a proper sense be viewed as being analogous because the Roman era in the broad European space in this context was largely monocentric (i.e. Rome-centric – 'All roads lead to Rome').

70 'In 15th-century Italy, a revival of interest in classical learning and secular studies, along with a flowering of artistic production, gave rise to the Renaissance (meaning "rebirth"). The movement soon spread to northern Europe, reshaping the continent's cultural landscape.' *History of the World Map by Map*, Rob Houston (Lead Senior ed) (DK Publishing 2018) 160.

71 '*Ius gentium*. yūs gān'tē-ūm. jus jen'tē-um. n. "Law of peoples." (1) In Roman law, *ius gentium* was originally the law applicable to persons lacking Roman citizenship, but, in Imperial Rome, its scope expanded to denote natural law rules supposedly applicable to all persons of any nationality, including Roman citizens. *Ius gentium* thus engulfed the *ius civile* applicable to Roman citizens in Justinian's Code. (2) In more modern usage, a body of law that is universally accepted by the international community as a whole (usually, though not always, based on a theory of natural law). The term is not synonymous with "international law." Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009) 155.

The same can be said about the period before the **Peace of Westphalia** of 1648 concerning most of Europe and the large parts of the world under the rule of Europeans, when the Roman Catholic Church's authority, the Holy Roman Empire's unique position, and, therefore, the prevalence of so-called **universalism** (which was embodied in the papacy and the Holy Roman Empire and, to some degree, stipulated the hierarchical political arrangement between certain European countries) as a core systemic principle prevented the creation of the essentially multi-centric interrelationships. Hence, in that era, Europe was not divided into sovereign states in the modern sense.⁷² Meanwhile, according to a contemporary understanding, states are considered organisational entities ruled by an effective government, entitled with centralised political power over their own territory and permanent population, being independent of external political control.

The issue of terminology

Starting from the eighteenth and nineteenth centuries in the English-speaking world, the term 'international law', which first was coined by Jeremy Bentham in 1780, was applied.⁷³ Before and after, for a certain period of time, the English term for this particular legal system was 'law of nations'.

New European approach to international law

In general, the road to the new European approach to international law can be more directly traced back to:

- the prominent theoretical thinkers of the sixteenth through eighteenth centuries; and
- the Peace of Westphalia and the political processes which took place during that era.⁷⁴

In this respect, as a theoretical legacy, we shall pay dues to the works of:

- **Francisco de Vitoria** (1486–1546), the Spanish philosopher, theologian, and jurist who is best known for his scientific attempt to safeguard the rights of the indigenous peoples of South America against Spanish colonists and for his ideas on putting limits on the right of justifiable warfare. Like the other thinkers of that era listed here, he

72 'Medieval kings were not in this position; internally, they shared power with their barons, each of whom had a private army; externally, they acknowledged some sort of allegiance to the Pope and to the Holy Roman Emperor.' Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th revised edn, Routledge 1997) 10.

73 'The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations*.' Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1907) 326.

74 'Modern international law has its origins in the Europe of the sixteenth and seventeenth centuries.' David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet & Maxwell 2015) 10.

recognised the importance of the law of nature for the development of the foundations of the law of nations, stressing that this legal system must be based on the universal law of nature and, therefore, non-Europeans should also be subjected to its reign.

- **Francisco Suárez** (1548–1617), the Spanish philosopher, theologian, and jurist, one of the greatest medieval scholastic philosophers, whose writings include treatises on law, the relationship between church and state, metaphysics, and theology. Francisco Suárez is often regarded as a ‘philosopher’⁷⁵ of international law. At the same time, he was convinced that the ‘[s]upranational unity is the source of the law of nations which . . . is not that part of natural law which governs the association of peoples, but a positive law, primarily of a customary and consensual nature, accepted by all peoples as the basis for their mutual relations.’⁷⁶
- **Alberico Gentili** (1552–1608), Italian jurist who concluded that the law of nations should reflect the actual practices of civilised nations, limited by moral but not necessarily by religious considerations. He argued in favour of transforming the law of nature from a theological concept into a concept of secular philosophy and, due to his works, is often called ‘the originator of the secular school of thought in international law’.⁷⁷
- **Hugo Grotius** (1583–1645), the Dutch jurist who is widely considered to be a founding father of international law in its modern understanding since he was the most consistent in organising the knowledge of his predecessors and his unique scientific approach into a comprehensive system. The cornerstone of his system was the secularist and rationalist rethinking of the law of nature⁷⁸ and its role in the law of nations. His well-known work *De Jure Belli ac Pacis* (*On the Law of War and Peace*) was first published in 1625 and became one of the leading works on international law.
- Other prominent scientists made essential contributions to the development of international law, such as:
 - The German naturalist writer and jurist **Samuel von Pufendorf** (1632–1694).
 - The English positivist writer and legal scholar **Richard Zouche** (1590–1661).
 - The Swiss jurist **Emer de Vattel**, who combined the arguments of naturalists and positivists, and so forth.

As regards the second significant basis which contributed to the foundation of the new international order under the law of nations, the Peace of Westphalia was a series of peace treaties. These treaties largely resulted in the ending of the so-called European wars

75 ‘The American internationalist James Brown Scott, in an endearing analogy, considered Francisco de Vitória to be the founder, Francisco Suárez the philosopher and Hugo Grotius the organizer of International Law.’ Paulo Emilio Vauthier Borges de Macedo, ‘The Law of War in Francisco Suárez: The Civilizing Project of Spanish Scholasticism’ (2012) 2(22), jul./dez. Revista da Faculdade de Direito da UERJ 1, 2.

76 Sergio Moratitel Villa, ‘The Philosophy of International Law: Suarez, Grotius and Epigones’ (1997) (320), September–October *International Review of the Red Cross*, 543–544.

77 Shaw (n 69) 17.

78 ‘In his influential work, *De Jure Belli ac Pacis*, he asserts that, even if God did not exist, natural law would have the same content.’ Wacks (n 19) 6.

of religion, as well as the protracted Dutch War of Independence (the Eighty-Years War) against the Spanish Monarchy and the Thirty Years' War (1618–1648) in the Holy Roman Empire.⁷⁹

The first wave of modern international law

Certainly, the formation of modern international law was facilitated by many political, religious, and cultural processes which developed in Europe over the centuries (for example, in 1517, Martin Luther published 95 theses, initiating to a considerable degree the so-called **Reformation**, which ultimately led to the decline of the political power of the Roman Catholic Church and the idea of universalism).

At the same time, undoubtedly, the international relations based on the Peace of Westphalia did not receive their contemporary form from the beginning, nor was the way ahead on the developmental trajectory without significant setbacks and hurdles to overcome. However, the foundation has been laid by the system-forming principles, which were strengthened by the Peace of Westphalia, and has led to the development of the new interstate model in Europe and, hence, the respective legal system (international law).⁸⁰ The two core principles underpinning the new system were as follows:

- *Rex est imperator in regno suo*, which meant that the ruler was sovereign within his or her own domain.
- *Cuius regio, eius religio*, which meant that the religion of the ruler was to dictate the religion of those ruled, a principle that prohibited interference in the internal affairs of other states on religious grounds.⁸¹

79 '[T]he treaty between Spain and Holland entered into Jan. 30, 1648, at Münster, which forms no diplomatic part of what is called the treaty of Westphalia, although it is an important prelude to it; the treaty between Sweden, the emperor, and the states of the empire, Oct. 24, 1648, at Osnabrück, being the first part of the treaty of Westphalia; finally, a treaty between France, the emperor and the states of the empire, Oct. 24, 1648, at Münster, being the second part of the treaty of Westphalia. This peace was not even general. France and Spain continued in a state of war until the peace of the Pyrenees, (Nov 1659), which was thus a complement to the treaties of Westphalia. The former brought peace to Germany and the north, the latter to the south.' *Cyclopaedia of Political Science, Political Economy, and the Political History of the United States by the Best American and European Writers*, John J. Lalor (ed), Volume 1 (Maynard, Merrill, and Co. 1899) 189.

80 'Consequently the treaty of Westphalia has been justly considered as the foundation of positive international law in Europe, and this treaty has been taken as the point of departure of this law.' *ibid* 189.

81 'Not all scholars agree on this. Some see the modern state emerging much earlier, others much later. But there is no doubt that the Peace of Westphalia is an important turning point in European politics and in world history. The Treaty established two core principles. The first was *rex est imperator in regno suo*. Literally, it means that the king is sovereign within his own domain and not subject to the political will of anyone else. . . . The second principle was *cuius regio, eius religio*. This principle confers upon the king the power to determine which religion is practised in his realm.' Martin Griffiths, Terry O'Callaghan and Steven C. Roach, *International Relations the Key Concepts* (2nd edn, Routledge 2008) 246–247.

Therefore, the Peace of Westphalia was without a doubt a significant political-legal foundation for the **first wave of modern international law** (the classical system of international law [1648–1918]), which was based on the recognition of sovereign states as the subjects of international law and on the essentially unlimited right to wage wars for the protection of national interests. Nevertheless, the system-maintaining principles mentioned here were initially limited to only certain European superpowers. Hence, the new world order was established for these superpowers in the predominantly Eurocentric world.

The last decades of this wave indicated the inclusion of certain non-European nations (for example, the United States and Japan) in the international power relations and the promulgation of a new humanitarian approach to interstate relations when, by the humanisation of warfare, the beginning of a new era of international law was announced. In this respect, the highly impressive new rules were approved during the **Hague Peace Conferences** of 1899 and 1907.

The second wave of modern international law

The **second wave of international law** (1919–1945) was formally inaugurated after the **First World War** when significant steps were taken in the direction of:

- spreading the system-maintaining principles beyond superpowers;
- attempting to institutionalise the international community against war; and
- limiting the use of force.

Consequently, the major developments during the second wave include granting independence to an extensive list of nations, the creation of the **League of Nations**, and the equipping of the international legal system with the general restriction of the use of force under the **Kellogg-Briand Pact** of 1928.

The third wave of modern international law

After the **Second World War**, the main challenge for the interstate system became the avoidance of a third world war. At this stage, the notable developments in science and technology led to the unparalleled improvements in the means of warfare, which had the potential to lead the humankind to the perpetual peace attained ‘in the great graveyard of the human race’.⁸² To avoid such deplorable events, the states began to reform the existing system of international relations.

- They formed the new collective security system under the auspices of the **United Nations Organisation (UN)** and placed the ultimate restriction on the threat or use of force at the heart of that very system.
- The other focus during the development of the **third wave of international law** was the process of **Decolonisation**, which resulted in the establishment of dozens of newly

82 The words of Immanuel Kant in his noble work *Perpetual Peace: A Philosophical Essay*.

independent states. The different political and economic interests of these newly independent states, along with their diverse cultural backgrounds, enriched international law with new perspectives.

- The recognition of the main challenge (avoidance of a third world war) also led to the need for more complex institutionalisation of interstate interaction. More inter-linked co-operation was considered the crucial precondition for maintaining international peace, which stipulated the creation of the **web of international governmental organisations**.
- The processes mentioned here also led to an increase in the importance of the **non-state actors** in international relations, with some of them even being entitled to become the subjects of international law.
- Meanwhile, the development of humankind fuelled the progress in thinking with respect to **human rights**, which were identified as the significant focus of international law.⁸³
- The process of Decolonisation 'was followed in the 1960s by a focus on economic development to provide the basic necessities for the poorest two thirds of the world and higher standards of living for all. In the 1970s, global values for nature and the environment emerged, as illustrated by the **United Nations Conference on the Human Environment** held in Stockholm in 1972.'⁸⁴

On the whole, the third wave of development of international law was influenced and given its shape by the bipolar configuration of the interstate system and the power relations of the **Cold War**.

New challenges

The collapse of the Soviet Union and the end of the Cold War in the early 1990s led to systemic turbulences in interstate affairs, which has yet to transform into a new and protracted equilibrium.

At the same time, since the 1970s and 1980s, **globalisation** as a process of interaction and integration of individuals and legal entities, as well as governments around the world, has dramatically accelerated due to advances in transportation and communication technology. Many authors designated 'the rapid technological advances in computers, communications, and software that have led to dramatic decreases in the cost of processing and

83 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.' *Prosecutor v Dusko Tadić a/k/a 'DULE'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, Tadić (IT-94-1). All cases of the International Criminal Tribunal for the Former Yugoslavia are available at the official website of the Tribunal <www.icty.org/en/cases>. In this book, materials from the website are used, taking into account the disclaimer and applicable legal rules.

84 United Nations, *Prototype Global Sustainable Development Report* (New York: United Nations Department of Economic and Social Affairs, Division for Sustainable Development 2014) <<http://sustainabledevelopment.un.org/globalsdreport/>> accessed 16 March 2021.

transmitting information' as the '**information revolution**'.⁸⁵ However, the process of the globalisation in itself has autonomously become a new challenge for the interstate system and international law as well. For example, during the so-called information revolution, the problem of **cybersecurity** and its regulation by legal norms emerged.

The latest developments have also brought up at the core of the agenda such large-scale challenges as, for example, the terrorism, migration, and so on, which significantly alter the boundaries that existed during the Cold War.

Finally, the **COVID-19** pandemic clearly demonstrated to humanity how vulnerable it is, even with all the latest technological advancement, and the rethinking of international law along the lines of the new crisis is once again back on the agenda for the interstate system. Many commentators argue that international law must solve all the problems which threaten the very existence of life; therefore, all **global problems** (which 'possess a large-scale risk potential, and present a high level of threat in the event that they are not resolved')⁸⁶ should be the focus of attention for the interstate legal system, i.e. international law. The problems of that type usually include the threat of unleashing of a third world war; environmental degradation; pandemic; demographic problems (uncontrolled population growth in the poorest countries and birth-rate decrease in developed countries); food crises and famine; resource and energy crises; international terrorist threats; national, socio-cultural, and religious conflicts; conflicts of civilisations; and so on.⁸⁷

Consequently, like the interstate system, international law is now in the process of being rethought in order to find a model that will be consistent with and will fundamentally reflect new realities.

Nonetheless, until now, contemporary international law has essentially retained the core framework it inherited from the early post-World War II period (targeting the avoidance of war and institution of peace in the interstate system), on which, in order to address the new challenges and objectives in the contemporary world, new principles and norms are gradually grafted. Furthermore, the new global threats are still perceived through the lenses of a more complex understanding of the concept of peace, which includes all aspects confronting the establishment of international peace. For example, in his remarks to the Security Council on the COVID-19 pandemic, UN Secretary-General António Guterres articulated that 'the pandemic also poses a significant threat to the maintenance of international peace and security – potentially leading to an increase in social unrest and

85 Robert O. Keohane and Joseph S. Nye, *Power & Interdependence* (4th edn, Pearson 2012) 213. At the same time, Robert O. Keohane and Joseph S. Nye, the prominent thinkers of the 'neoliberal institutionalism' (the theory on international relations, also referred to as the theory of 'complex interdependence'), outlined: 'Traditionally, political activity has focused first at the local level, only extending to national and international spheres as the activity being regulated escaped jurisdictional boundaries. The contemporary information revolution, however, is inherently global, since "cyberplace" is divided on a nongeographical basis. The suffixes "edu," "org," and "com" are not geographical; and even where a country suffix appears in an address, there is no guarantee that the person being reached actually resides in that jurisdiction.' *ibid* 212.

86 See 'Global Problems' <http://planetaryproject.com/global_problems/> accessed 16 March 2021.

87 *ibid*.

violence that would greatly undermine our ability to fight the disease.⁸⁸ The complex understanding of peace will be examined later in this book.

SPECIFICS OF INTERNATIONAL LAW



FIGURE 1.4 International law – interstate system – international relations

88 'Secretary-General's Remarks to the Security Council on the COVID-19 Pandemic [as Delivered]' (9 April 2020) <www.un.org/sg/en/content/sg/statement/2020-04-09/secretary-generals-remarks-the-security-council-the-covid-19-pandemic-delivered> accessed 16 March 2021.

a) Interstate system

complex network of relations
 third wave of international law development
 interstate legal system
 interstate system
 horizontal (anarchic) arrangement model
 sovereign equality
 superpowers
 privileged legal position
 consent

A complex web

There is a very **complex network of relations** at the international level, in which states, as well as other entities and persons, engage. During the period described in this book as the **third wave of international law development**, the international network shifted to an even more complicated web of relations, in which numerous entities and persons participate.

Nevertheless, only a few of them have acquired the status of a genuine member (actor) of the **interstate legal system**, elevating them to the status of a subject of international law. Hence, in this book, the **interstate system** refers to the systemic and arranged relationships between those subjects, i.e. the states and other subjects of international law.

Horizontal model

The interstate system, as emphasised earlier, is essentially built on the **horizontal (anarchic) arrangement model**, based mainly on the principle of **sovereign equality** of states.

A unique legal position of the superpowers

However, preliminarily, the substantial areas are defined in which maintenance of international peace and security are to a significant degree reserved for the **superpowers** by virtue of their holding a **privileged legal position** (especially in the UN Security Council, which has five permanent members – China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America). On the other hand, other domains follow the logic of the horizontal arrangement of states.

At the same time, the possession in certain areas of a privileged legal position by superpowers also means that these states have a great responsibility to the entire interstate system. Certainly, with great power comes great responsibility.

Establishment of law by consent (approval)

Finally, for the establishment of law in the interstate system, there is no alternative to **consent** (approval) as the sole mechanism since, in the international order, there exists no legal superiority (subordination) in relations between the subjects.

b) State as the main subject of international law

notion of the subject
 law-making process
 right to apply the legal norms
 other subjects of international law
 people
sui generis territorial entities
sui generis non-territorial entities
 international organisations
 universal subjectivity
 limited subjectivity
 subjectivity of individuals

A complex notion of the subject of international law

In international law, the **notion of the subject** of international law is defined in rather complex terms, which primarily state that a subject is a person who participates in the **law-making process** and affords itself the **right to apply the legal norms**.⁸⁹

A state as the main subject of international law

On the whole, international law indeed is an interstate law. Hence, a state is a principal subject.

Other subjects

However, the international legal order is also maintained by the **other subjects** (international law actors), namely:

- The **people** in the process of self-determination (usually, the people on the road to independence), based on the principle of equal rights and self-determination of peoples;

⁸⁹ The notion of the subject of international law will be addressed more precisely later in this book.

- The *sui generis*⁹⁰ territorial entities;
- The *sui generis* non-territorial entities; and
- International organisations (intergovernmental organisations).

Scope of subjectivity

The scope of subjectivity depends on the type of subjectivity to which a given entity belongs (a state, a *sui generis* territorial entity, and so on). Only states obtain unlimited and universal subjectivity.

The limited subjectivity of the other subjects of international law

The subjectivity of the other actors of international law is limited and corresponds to the degree of their accommodation at the interstate level (**limited subjectivity**).

This limitation is determined by the role (mission, functions) of a given entity. Namely, the scope of subjectivity:

- for the people is defined by the process of self-determination, which means that they are entitled to participate in international legal activities only concerning the issues related to their self-determination process;
- for the *sui generis* territorial entities is ensured in areas where their international status is recognised by other subjects of international law;
- for the *sui generis* non-territorial entities is stipulated by their mission; and
- for the international organisations is determined by the assigned functions and competencies stemming from their foundational treaties (or other instruments).

Subjectivity of individuals

At the same time, in the scholarship dedicated to international law, the problem of **subjectivity of individuals** persists. However, individuals *per se* are not actors at the interstate level, and respectively, of international law, since they, as individuals, are not entitled to participate in the law-making process and the execution of international norms.

For example, regardless of the existence of international law norms with direct reference to the humans, establishment and application of these norms through the power mechanisms is indeed reserved for the interstate level. Hence, in this regard as well, the states (and other subjects of international law) hold the responsibility to the other states (and other subjects of international law) on the interstate level.

90 'SUI GENERIS [L. *sui* + *genus*, *generis* / class, kind] Of its own kind. Unique; in a class by itself. Different from others.' Lazar Emanuel, *Latin for Lawyers* (1st edn, Emanuel Publishing Corp 1999) 402.

c) Sources and norms of international law

consensual nature
 no hierarchy
 international treaties
 international custom
 general principles of law
 unilateral acts
 subsidiary sources
 soft law
jus cogens norms
 dispositive norms

The consensual nature of the sources of law

The sources of international law maintain a **consensual nature**. The subjects constitute them. Under the original concept of international law, applying the norms to a subject that has not given its consent is not permitted.

The sources of law

There is **no hierarchy** between the sources of international law.

There are three sources of international law:

- international treaties;
- international custom; and
- general principles of law.

In international law, a special place is occupied by the **unilateral acts** of states, the **subsidiary sources** of international law – the judicial decisions and the teachings of the most highly qualified publicists – and the **soft law**.

Complex arrangement of international law

In international law, there exists a complex arrangement model between norms (rules and principles). The principal framework for their validity is provided by the concept of ***jus cogens* norms**, which envisages that all the rules of international law are either *jus cogens* or other norms (**peremptory and dispositive norms** of international law). The peremptory norms of general international law are developed from the sources of international law, and they can be changed in the same way through a new norm with the same legal force. They are a set of rules which are peremptory in nature and from which no derogation is allowed under any circumstances.

d) International law as applied by subjects

enforcement system
 pacific settlement of disputes
 international legal responsibility
 reciprocity
 collective action
 public opinion
 only opportunity

Application of international law

The subjects of international law not only constitute the international norms but also act individually or collectively to apply these norms, including through enforcement and dispute resolution mechanisms.

Enforcement system

Generally, the **enforcement system** of international law is supported by the integrated model of **pacific settlement of disputes**; **international legal responsibility**; and such mechanisms as **reciprocity**, **collective action**, and **public opinion**.

- Reciprocity is a type of enforcement which stipulates that if a particular subject offends against another subject, the other will respond by returning the same behaviour.
- Through collective action, several subjects act together to persuade a subject to comply with its legal obligations.
- Usually, the states and other subjects of international law avoid negative publicity, so the threat of negative public opinion regarding their behaviour may often be an effective enforcement mechanism.

Dispute resolution

In the interstate system, a comprehensive dispute resolution system is introduced, which includes several international institutions on the global, regional, or bilateral levels, such as the international courts and arbitral tribunals (tribunals established on a parity basis or permanent arbitral tribunals), as well as other bodies with competence in the conclusion of a controversy.

However, (1) the power of international adjudicative institutions is limited to the extent established by their constituent sources, and (2) their jurisdiction covers only the subjects of international law that recognise their competence to make binding decisions.

The application system described here as the only opportunity

It is of utmost importance to clearly comprehend that the contemporary law-applying system of international law is the only opportunity to implement the rules of law in the horizontal framework of the interstate system.

e) Avoidance of war and institution of peace

war and peace
Eurocentric
third world war
co-operation in various fields
negative peace
positive peace
Declaration on the Right of Peoples to Peace
sacred right to peace

The mission of international law

The main concerns for international law are **war and peace**, whereas the primary aim of national law is to avoid the conflicts between humans and establish civil peace.

The great thinkers who contributed to the establishment and development of modern international law intended precisely such a mission (the avoidance of war and institution of peace) for international law. Moreover, across the centuries, when the world appeared to be principally **Eurocentric**, the law of nations emerged mostly in the form of peace treaties. Meanwhile, Europe is the birthplace of the 'law of nations'. Accordingly, the legacy of that period and its European roots are easily recognisable in contemporary international law.

Avoidance of a third world war

The mission of avoidance of war and institution of peace fuelled the development of the entirety international law, as well as its particular areas.

Meanwhile, after the Second World War, the main concern was the avoidance of a **third world war** and the survival of humanity. Consequently, a collective security system was developed, in which the superpowers hold the qualitatively different and privileged responsibility of maintaining international peace and are equipped with respective legal instruments in the UN Security Council.

Co-operation in various fields

At the same time, the idea that **co-operation in various fields** is necessary for the maintenance of international peace and security is embodied in international law. Thus, the

accomplishment of this idea flourished with the creation of a web of multilinked international institutions with corresponding developments of the interstate system.

The meaning of peace

Traditionally, peace and war were interlinked notions. Peace was defined in terms of the absence of war or military hostilities. Such understanding was usually referred to as ‘**negative peace**’ (*absentia belli*).

However, in parallel with this understanding of peace, a more all-encompassing notion was developed, which included the elimination of all or at least the major preconditions/causes of war. Such introspection was expressed in a well-known work, *Perpetual Peace: A Philosophical Essay*, by one of the most famous thinkers of all times – Immanuel Kant (1724–1804).

In the Kant’s opinion, ceasing of the military activities represents only a temporary truce while the reservations and underlying causes for war, including latent causes for the future conflict have not been eradicated. Only when all the underlying causes for war are eliminated, including those on which parties are silent but which have the potential to materialize into a war at the later stage, can the perpetual peace be realized Consequently, Immanuel Kant diverts into offering a positive definition of peace, whereby in his analysis peace is presented as the condition where all the reservations and potential points for inflaming a conflict are settled and the incentives for starting a war between the parties concerned becomes obsolete.⁹¹

Over time, the meaning of **positive peace** was developed. It ‘aimed at the creation of conditions of equity and social justice preventing recourse to violence. Positive peace requests measures to prevent and put an end to deprivation of rights and liberties, domination of peoples by other peoples.’⁹²

Such an understanding of peace gradually covered both the direct underlying causes for war as well as numerous indirect motivations, i.e. the factors which potentially could stipulate instability in the interstate system and, therefore, challenge international peace, as was stressed concerning the COVID-19 pandemic by the UN Secretary-General António Guterres in his statement mentioned earlier.

The right to peace

The Charter of the United Nations proclaimed the basic principles necessary for an enduring international peace. However, in 1984, the UN General Assembly adopted the Resolution and its annex, the **Declaration on the Right of Peoples to Peace**.⁹³ According

91 Pataraiia (n 8) 108.

92 Djacoba Liva Tehindrazanarivelo and Robert Kolb, ‘Peace, Right to, International Protection’ (2006) *Max Planck Encyclopedia of Public International Law* <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e858>> accessed 16 March 2021.

93 A/RES/39/11 of 12 November 1984. All UN General Assembly resolutions are available at the official website of the UN <www.un.org/en/sections/documents/general-assembly-resolutions/>. In this book, materials from the website are used according to applicable legal rules.

to the Declaration, the General Assembly ‘solemnly’ proclaimed ‘that the peoples of our planet have a **sacred right to peace**’ and ‘that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State’. Hence, the UN General Assembly announced the start of a new era in which peace should be envisioned as a right. ‘Consequently, the step has been taken from an abstract philosophical ideal to a more concrete political-legal principle.’⁹⁴

CASES AND MATERIALS (SELECTED PARTS)

Legal families

Rene David and John E. C. Brierley, *Major Legal Systems in the World Today* (3rd edn, Stevens & Sons 1985) 22–36.

‘18. Romano-Germanic family

A first family may be called the Romano-Germanic family. This group includes those countries in which legal science has developed on the basis of Roman *jus civile*. Here the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality. To ascertain and formulate these rules falls principally to legal scholars who, absorbed by this task of enunciating the “doctrine” on an aspect of the law, are somewhat less interested in its actual administration and practical application. These matters are the responsibility of the administration and legal practitioners. Another feature of this family is that the law has evolved, primarily for historical reasons, as an essentially private law, as a means of regulating the private relationships between individual citizens; other branches of law were developed later, but less perfectly, according to the principles of the “civil law” which today still remains the main branch of legal science. Since the nineteenth century, a distinctive feature of the family has been the fact that its various member countries have attached special importance to enacted legislation in the form of “codes”.

‘19. Common law family

A second family is that of the Common law, including the law of England and those laws modelled on English law. The Common Law, altogether different in its characteristics from the Romano-Germanic family, was formed primarily by judges who had to resolve specific disputes. Today it still bears striking traces of its origins. The Common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is then much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judgments have, for Common law lawyers, an importance equal, or even superior, to substantive legal rules because, historically, their immediate pre-occupation has been to re-establish peace rather than articulate a moral basis for the social order. Finally, the origins of the Common law are linked to royal power. It was developed as a system in those cases where the peace of the English kingdom was threatened, or when some other important consideration required, or

⁹⁴ Tehindrazanarivelo and Kolb (n 92).

justified, the intervention of royal power. It seems, essentially, to be a *public* law, for contestations between private individuals did not fall within the purview of the Common law courts save to the extent that they involved the interest of the crown or kingdom. In the formation and development of the Common law- a public law issuing from procedure-the learning of the Romanists founded on the *jus civile* played only a very minor role. The divisions of the Common law, its concepts and vocabulary, and the methods of the Common law lawyer, are entirely different from those of the Romano-Germanic family.'

'23. Muslim, Hindu, and Jewish laws

But law may also be seen as a model of ideal behaviour, one not to be confused with the actual rules by which individuals act which courts apply. European universities, in their pre-nineteenth-century tradition, paid very little attention to national or customary laws of the time and taught, almost exclusively, an ideal law constructed on the basis of Roman law. In Muslim countries, in the same way, more attention is given to the model law linked to the Islamic religion than to local custom (treated as a phenomenon of fact) or the laws and decrees of the sovereign (treated as merely administrative measures) and neither of these is thought to possess the full dignity of law. The same can be said of Jewish law and, in a very different context, Hindu law.'

'24. Far East

The situation in the Far East, especially China is completely different. Here there is no question of studying an ideal law distant from rules laid down by legislators or simply followed in practice: here the very value of law itself has traditionally been put into question.'

'25. Black Africa and Malagasy Republic

. . . There too, in milieux in which the community' cohesion prevails over any developed sense of individualism; the principal objective is the maintenance or restoration of harmony rather than respect for law. The Western laws adopted in Africa are often hardly more than a veneer, the vast majority of the population still lives according to traditional ways which do not comprise what we in the West call law and without heed to what is very often nothing more than an artificially implanted body of rules.'

Natural law

Thomas Hobbes, *Leviathan or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil*
(2nd edn, George Routledge and Sons 1886) 65–67, 71–72.

'Chapter XIV. Of the First and Second Natural Laws, and of Contracts

"The right of nature", which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his

own life; and consequently, of doing anything, which in his own judgement and reason he shall conceive to be the aptest means thereunto.

By "liberty," is understood, according to the proper signification of the word, the absence of external impediments: which impediments may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgement and reason shall dictate to him.

A "law of nature," *lex naturalis*, is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *jus* and *lex*, "right" and "law:" yet they ought to be distinguished; because "right," consisteth in liberty to do, or to forbear; whereas "law," determineth and bindeth to one of them; so that law and right differ as much as obligation and liberty; which in one and the same matter are inconsistent.

And because the condition of man, as hath been declared in the precedent chapter, is a condition of war of every one against every one; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition, every man has a right to everything; even to one another's body. And therefore, as long as this natural right of every man to everything endureth, there can be no security to any man, how strong or wise soever he be, of living out the time, which Nature ordinarily alloweth men to live. And consequently it is a precept, or general rule of reason, "that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war." The first branch of which rule, containeth the first, and fundamental law of Nature; which is, "to seek peace, and follow it." The second, the sum of the right of Nature, which is, "by all means we can, to defend ourselves."

From this fundamental law of Nature, by which men are commanded to endeavour peace, is derived this second law; "that a man be willing, when others are so too, as far forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself." For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he; then there is no reason for anyone to divest himself of his: for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace. This is that law of the Gospel; "whatsoever you require that others should do to you, that do ye to them." And that law of all men, *quod tibi fieri non vis, alteri ne feceris*.

To "lay down" a man's "right" to anything, is to "divest" himself of the "liberty," of hindering another of the benefit of his own right to the same. For he that renounceth, or passeth away his right, giveth not to any other man a right which he had not before; because there is nothing to which every man had not right by Nature: but only standeth out of his way, that he may enjoy his own original right, without hindrance from him; not without hindrance from another. So that the effect which redoundeth to one man, by another man's defect of right, is but so much diminution of impediments to the use of his own right original.

Right is laid aside, either by simply renouncing it; or by transferring it to another. By "simply renouncing;" when he cares not to whom the benefit thereof redoundeth. By "transferring;" when he intendeth the benefit thereof to some certain person or persons. And when a man hath in either manner abandoned, or granted away his right; then is he said to be "obliged," or "bound," not

to hinder those, to whom such right is granted, or abandoned, from the benefit of it: and that he "ought," and it is his "duty," not to make void that voluntary act of his own'.

'Chapter XV. Of Other Laws of Nature

From that law of Nature, by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind, there followeth a third; which is this, "that men perform their covenants made;" without which, covenants are in vain, and but empty words; and the right of all men to all things remaining, we are still in the condition of war.

And in this law of Nature consisteth the fountain and original of "justice." For where no covenant hath preceded, there hath no right been transferred, and every man has right to everything; and consequently, no action can be unjust. But when a covenant is made, then to break it is "unjust:" and the definition of "injustice," is no other than "the not performance of covenant." And whatsoever is not unjust, is "just."

Natural law

John Locke, *Two Treatises of Government*

(A new edition corrected. published 1821 (MDCCCXXI) by Printed for Whitmore and Fenn and C. Brown) Book II, 189–190, 191–192, 200, 204.

'Chapter II.

Of the State of Nature

§ 4. To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, *a state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.

A *state also of equality*, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.'

'§ 6. But though this be a *state of liberty*, yet it is not a *state of license*: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there

cannot be supposed any such *subordination* among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one, as he is *bound to preserve himself*, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to *preserve the rest of mankind* and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.

§ 7. And that all men may be restrained from invading others rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and *preservation of all mankind*, the *execution* of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation: for the *law of nature* would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a *power to execute* that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that *state of perfect equality* where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.'

'Chapter III.

Of the State of War

§ 16. The *state of war* is a state of *enmity* and *destruction*: and therefore declaring by word or action, not a passionate and hasty, but a sedate settled design upon another man's life *puts him in a state of war* with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him, or any one that joins with him in his defence, and espouses his quarrel; it being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, *by the fundamental law of nature, man being to be preserved* as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a *wolf* or a *lion*; because such men are not under the ties of the common-law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures, that will be sure to destroy him whenever he falls into their power.'

'§ 21. To avoid this *state of war* (wherein there is no appeal but to heaven, and wherein every the least difference is apt to end, where there is no authority to decide between the contenders) is one great reason of men's putting themselves into society, and quitting the state of nature: for where there is an authority, a power on earth, from which relief can be had by *appeal*, there the continuance of the *state of war* is excluded, and the controversy is decided by that power.'

Natural law

Lon L. Fuller, *The Morality of Law*
(Revised edn, Yale University Press 1969) 96–98.

III. The Concept of Law

What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as “the enterprise of subjecting human conduct to the governance of rules.” These natural laws have nothing to do with any “brooding omnipresence in the skies.” Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God’s law. They remain entirely terrestrial in origin and application. They are not “higher” laws; if any metaphor of elevation is appropriate they should be called “lower” laws. They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.’

With the positivists certainly no clear pattern emerges. Austin defined law as the command of a political superior. Yet he insisted that “laws properly so-called” were general rules and that “occasional or particular commands” were not law. Bentham, who exploited his colorful vocabulary in castigating the law of nature, was at all times concerned with certain aspects of what I have called the internal morality of law. Indeed, he seemed almost obsessed with the need to make the laws accessible to those subject to them. On the other hand, in more recent times Gray has treated the question whether law ought to take the form of general rules as a matter of “little importance practically,” though admitting that specific and isolated exercises of legal power do not make a fit subject for jurisprudence. For Somlo retroactive laws might be condemned as unfair, but in no sense are to be regarded as violating any general premise underlying the concept of law itself.

With respect to thinkers associated with the natural law tradition it is safe to say that none of them would display the casualness of a Gray or Somlo toward the demands of legal morality. On the other hand, their chief concern is with what I have called substantive natural law, with the proper ends to be sought through legal rules.’

Legal positivism

Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*
(Oxford: Clarendon Press, MCMVII) 18, 324, 326–327, 329

¹ 6. A great multitude of people are continually talking of the Law of Nature; and then they go on giving you their sentiments about what is right and what is wrong: and these sentiments, you are to understand, are so many chapters and sections of the Law of Nature.

7. Instead of the phrase, Law of Nature, you have sometimes, Law of Reason, Right Reason, Natural Justice, Natural Equity, Good Order. Any of them will do equally well. This latter is most used in politics. The three last are much more tolerable than the others, because they do not very explicitly claim to be any thing more than phrases: they insist but feebly upon the being looked upon as so many positive standards of themselves, and seem content to be taken, upon occasion, for phrases expressive of the conformity of the thing in question to the proper standard, whatever that may be. On most occasions, however, it will be better to say *utility*: *utility* is clearer, as referring more explicitly to pain and pleasure.’

XXIII. Now *law*, or *the law*, taken indefinitely, is an abstract and collective term; which, when it means any thing, can mean neither more nor less than the sum total of a number of

individual laws taken together. It follows, that of whatever other modifications the subject of a book of jurisprudence is susceptible, they must all of them be taken from some circumstance or other of which such individual laws, or the assemblages into which they may be sorted, are susceptible.'

² In most of the European languages there are two different words for distinguishing the abstract and the concrete senses of the word *law*: which words are so wide asunder as not even to have any etymological affinity. In Latin, for example, there is *lex* for the concrete sense, *jus* for the abstract; in Italian, *legge* and *diritto*; in French, *loi* and *droit*; in Spanish, *ley* and *derecho*; in German, *gesetz* and *recht*. The English is at present destitute of this advantage.

In the Anglo-Saxon, besides *lage*, and several other words, for the concrete sense, there was the word *right*, answering to the German *recht*, for the abstract as may be seen in the compound *folc-right*, and in other instances. But the word *right* having long ago lost this sense, the modern English no longer possesses this advantage.'

'XXV. In the second place, with regard to the *political quality* of the persons whose conduct is the object of the law. These may, on any given occasion, be considered either as members of the same state, or as members of different states: in the first case, the law may be referred to the head of *internal*, in the second case, to that of *international* jurisprudence.

Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re natâ*, to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain then the mutual transactions between sovereigns, as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international*.

With what degree of propriety rules for the conduct of persons of this description can come under the appellation of *laws*, is a question that must rest till the nature of the thing called a *law* shall have been more particularly unfolded.

It is evident enough, that international jurisprudence may, as well as internal, be censorial as well as expository, unauthoritative as well as authoritative.'

'XXVIII. Fourthly, in point of *expression*, the laws in question may subsist either in the form of *statute* or in that of *customary* law.

As to the difference between these two branches (which respects only the article of form or expression) it cannot properly be made appear till some progress has been made in the definition of a law.

XXIX. Lastly, The most intricate distinction of all, and that which comes most frequently on the carpet, is that which is made between the *civil* branch of jurisprudence and the *penal*, which latter is wont, in certain circumstances, to receive the name of *criminal*.'

Legal positivism

John Austin, *The Province of Jurisprudence Determined*

(London: John Murray, Albemarle Street 1832) 5, 6–7, 11–13, 18, 29.

'Having stated the essentials of a law or rule, I shall distinguish laws established by political superiors, from laws set by men to men (but *not* by political superiors), and from that Divine law which is the ultimate test of human.

Having distinguished laws established by political superiors, from the laws (properly so called) to which they are related by resemblance, and from the laws (improperly so called) to which they are nearly related by a strong analogy, I shall advert to the improper applications of the term *law* which are merely metaphorical or figurative.

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.

Now since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But simple as it is, it admits of explanation. And, since it is the key to the sciences of jurisprudence and morals, its meaning should be analyzed with precision.'

'If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. . . .

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty, are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.'

'It appears, then, from what has been premised, that the ideas or notions comprehended by the term *command* are the following. 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

It also appears from what has been premised, that *command*, *duty* and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

"A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded," are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

But when I am talking *directly* of the expression or intimation of the wish, I employ the term *command*: The expression or intimation of the wish being presented *prominently* to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

When I am talking directly of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty*, or the term *obligation*: The liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

When I am talking *immediately* of the evil itself, I employ the term *sanction*, or a term of the like import: The evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness and precision), I can express my meaning accurately, in a breath. Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and precisely. I must, therefore, note them, as well as I can, by the ambiguous and inexpressive name of "*occasional* or *particular* commands."

The term *laws* or *rules* being not unfrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands, may, I think, be stated in the following manner.

By every command, the party to whom it is directed is obliged to do or to forbear.

Now where, it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually* a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures, as well as by the class or description to which they belong.

The statement which I have now given in abstract expressions, I will endeavour to illustrate by apt examples.

If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden, are specifically determined or assigned.

But if you command him *simply* to rise at that hour, or to rise at that hour always, or to rise at that hour *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct.'

'A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a class.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*.'

'Like other signification of desire, a command is express or tacit. If the desire be signified by words (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are tacit commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, "that they shall serve as a law to the governed."

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences.'

Legal positivism

Herbert Lionel Adolphus Hart, *The Concept of Law*
(2nd edn, Clarendon Press 1994) 214, 236–237

'International law presents us with the converse case. For, though it is consistent with the usage of the last 100 years to use the expression 'law' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists. The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. It is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying "sources" of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question "Is international law really law?" can hardly be put aside. But in this case also, we shall neither dismiss the doubts, which many feel, with a simple reminder of the existing usage; nor shall we simply confirm them on the footing that the existence of a union of primary and secondary rules is a necessary as well as a sufficient condition for the proper use of the expression "legal system".'

'Bentham, the inventor of the expression "international law", defended it simply by saying that it was "sufficiently analogous" to municipal law. To this, two comments are perhaps worth adding. First, that the analogy is one of content not of form: secondly, that, in this analogy of content, no other social rules are so close to municipal law as those of international law.'

Pure theory of law

Hans Kelsen, *Pure Theory of Law*
Max Knight (tr) (University of California Press 1967) 320, 323, 214–217.

'42. The Essence of International Law

a) The Legal Nature of International Law

According to the traditional definition, international law is a complex of norms regulating the mutual behavior of states, the specific subjects of international law.

In accordance with the concept of law here accepted, so-called international law is "law," if it is a coercive order, that is to say, a set of norms regulating human behavior by attaching certain coercive acts (sanctions) as consequences to certain facts, as delicts, determined by this order as conditions, and if, therefore, it can be described in sentences which – in contradistinction to legal norms – may be called "rules of law".'

'b) International Law as a Primitive Legal Order

International law, as a coercive order, shows the same character as national law, i.e. the law of a state, but differs from it and shows a certain similarity with the law of primitive, i.e. stateless society in that international law (as a general law that binds all states) does not establish special organs for the creation and application of its norms. It is still in a state of far-reaching decentralization. It is only at the beginning of a development which national law has already completed. General norms are created by custom or treaty, which means: by the members of the legal community themselves, not by a special legislative organ. And the same is true for the application of the general norms in a concrete case. It is the state itself, believing its rights have been violated, which has to decide whether the fact of a delict exists for which another state is responsible. And if this other state denies the asserted delict, and if no agreement can be reached between the two parties concerned, no objective authority exists competent to decide the conflict in a legally regulated procedure. And it is the state whose rights have been violated which is authorized to react against the violator by reprisals or war as the coercive acts provided for by international law. The technique of self-help, characteristic of primitive law, prevails.'

The legal character of international law

Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*

(7th edn, Oxford University Press 2012) 77–78, 79, 80.

'It has often been said that international law ought to be classified as a branch of ethics rather than of law. The question will clearly depend on the definition of law which we choose to adopt; in any case it does not affect the value of the subject one way or the other, though those who deny the legal character of international law often speak as though "ethical" were a depreciatory epithet. In fact it is both practically inconvenient, and contrary to sensible legal thinking to deny the legal character of international law.

It is inconvenient because, if international law is nothing but international morality, it is certainly not the whole of international morality, and it is difficult to see how we are to distinguish it from those other, admittedly moral, standards which we apply in forming our judgments on the conduct of states. Ordinary usage certainly uses two tests in judging the "rightness" of a state's act, a moral test and another one which is somehow felt to be independent of morality. Every state habitually commits acts of selfishness which are often gravely injurious to other states, and yet are not contrary to international law; but we do not on that account necessarily judge them to have been "right". It is confusing and pedantic to say that both these tests are moral. Moreover, it is the pedantry of the theorist and not of the practical person; for questions of international law are invariably treated as legal questions by the foreign ministries which conduct our international business, and in the courts, national or international, before which they are brought. Legal forms and methods are used in diplomatic controversies and in judicial and arbitral proceedings, and authorities and precedents are cited every day in argument.'

'It is only in quite modern times, when we have come to regard it as natural that the state should be constantly making new laws and enforcing existing ones, that to identify law with the will of the state has become even a plausible theory. We can agree that today the only essential conditions for the existence of law are: the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity. International law seems generally to satisfy these conditions.'

'The best view is that international law is in fact just a system of customary law, upon which has been erected, almost entirely within the last century, a superstructure of 'conventional' or treaty-made law, and some of its chief defects are precisely those that the history of law teaches us to expect in a customary system.

It is a common mistake to suppose that the most conspicuous defect of international law is the frequency of violations. Actually international law is normally observed because, as we shall see, the vast majority of demands that it makes on states are not exacting; and states generally find it convenient to observe the law. This fact receives little notice however, because the interest of most people in international law is not with the ordinary routine of international legal business, but in the rare and often sensational occasions on which it is flagrantly broken. Such breaches generally occur either when some great political issue has arisen between states, or in that part of the system which professes to regulate the conduct of war. So our diagnosis of what is wrong with the system will be mistaken if we fail to realize that most customary rules and the great majority of treaties are, on the whole, regularly observed in international relations. And this is no small service to international life, however far it may fall short of the ideal by which we judge the achievements of the system. If we fail to understand this, we are likely to assume, as many people do, that all would be well with international law if we could devise a better system for enforcing it.'

The legal character of international law

David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet & Maxwell 2015) 5, 10–11.

'1 INTRODUCTION

Notes

- 2 *The Austinian Handicap*. "Is international law 'law'?" is a standard question asked of international lawyers. Its sometimes irritating persistence is very largely the responsibility of John Austin, an English jurist of the first part of the nineteenth century and a familiar friend of any student who has taken a course in jurisprudence. He defines laws "properly so-called" as commands and "positive law", which he regarded as the "appropriate matter of jurisprudence", as the commands of a sovereign. A sovereign he defined as a person who received the habitual obedience of the members of an independent political society and who, in turn, did not owe such obedience to any other person. Rules of international law did not qualify as rules of "positive law" by this test and, not being commands of any sort, were placed

by Austin in the category of "laws improperly so-called". This uncompromising and unhappily phrased rejection of international law's claim to be law of the same order as municipal law has, to this day, upset international lawyers and placed them on the defensive. Although international law is still not "law" according to Austin's test, most international lawyers would at least dispute that that test is more helpful than certain others (e.g. that of Pollock, quoted by Brierly) by which international law could be said to be "law".'