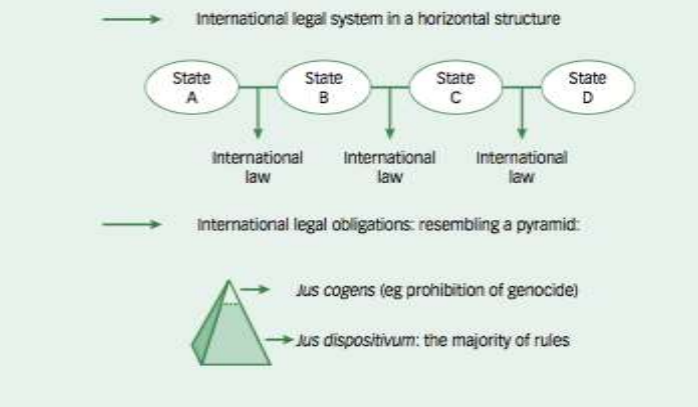
The Nature of International Law



International law does exist and it does matter. International law concerns the invasion of Iraq or the killing of Osama bin Laden, news that makes the headlines of newspapers worldwide. International law also concerns day-to-day matters, such as the checking of passports at Heathrow airport. International law lays down rules governing the relations of sovereign States, but also grants rights to individuals, from the citizens of a State to asylum-seekers traversing the ocean to and a safe home. International law deals with international crimes, like genocide, but also regulates the simple extradition of a common criminal to his State of nationality.

As law in any given era and society is the product of its time, so too international law is the product of international society, evolving as the latter develops. For example, in the nineteenth century there were enough rules, especially of customary origin, to address the needs of the then State-centred international society. Today, the needs of international society have significantly increased by reason of its transformation and expansion. In the twenty first century, international law is called to address the needs of the 193 Member States of the United Nations, numerous international organizations, an indefinite number of non-State entities (eg multinational enterprises or Non-Governmental Organizations), and individuals.

At the same time, the international legal system remains fundamentally different from national legal orders. In the domestic setting, rules spring from a centralized legislative authority on the basis of a well-de ned constitutional framework. These rules are enforced by a central authority, the executive branch of government, and when a dispute arises regarding their application concerned parties have recourse to the judiciary. This vertical system is not rejected on the international plane. There is no international parliament or central legislative body. There exists no central administration to enforce international rules, nor an inter- national court with mandatory jurisdiction that is open to both State and non-state entities.

International society consists of a constellation of sovereign States and other international organizations, which are dispersed in a rather horizontal order of authority. International law is the chain that holds them together, providing the rules that govern their coexistence in this anarchical yet interdependent universe. In this horizontal international legal order, the central figure is none other than the State, being able to create custom through its practice, adopt treaties, or establish other subjects of international law, ie international organizations.

This does not mean that States are free to choose not to be bound by any rules whatsoever. Rather, they consent to be bound because of the mutual benefits generated as a result. Theorists have long struggled with the question as to why international law is, or should be, binding, as well as with the nature of the international legal system. International legal theory has long been puzzled, apparently drawing analogies with the domestic legal systems with the hierarchy of norms. Should all international rules possess the same nature, being open to derogation and eternal change? The answer was given fairly recently with the acknowledgement of a set of norms that have, in principle, a superior position in the normative pyramid. These are so-called peremptory norms of international

law that trump, or at least should trump, every other conflicting rule and from which there is no derogation. Peremptory norms include the prohibition of aggression, genocide, and torture, among others.

The structure of the international legal system

It is true that the international community seems more 'anarchical' than any other known legal community. This is due to historic grounds but also explained by the simple fact that there is no real 'hegemon' (ie leader), as Machiavelli would envisage, or a Hobbesian 'Leviathan', to hold sway. The international legal system is horizontally structured and this has consequences both in relation to its perception and its function. All States are considered equal as sovereign States (the principle of sovereign equality, enshrined in Art 2, para 1 UN Charter) and are not subject to the power of any supranational authority without their con- sent. Thus, sovereign equality and the need for State consent become extremely important in the international legal order. Indeed, there is no central legislature but all States may adopt agreements or engage in practice generating customary law on a bilateral, regional, or universal level. No State is subjected to third party dispute settlement, let alone to the International Court of Justice, if it has not offered its prior consent. What are the reasons for this? Primarily, international society was never conceived in the same terms as its national counterparts. States could not accept their subjection to a higher authority that could enact and enforce rules or settle disputes without their permission. The question, however, as to how States could coexist, remained. The answer was to accept the need for some international regulation on the basis of common agreement in order to main- tain a minimum public order and stability in international society.

This image of the international community has gradually changed. States have increased, new actors have come to the fore, particularly international organizations, transnational corporations, and international civil society. Even so, State consent remains paramount in the making and enforcement of rules. This was unequivocally illustrated in one of the rst cases before the Permanent Court of Justice, the celebrated *Lotus case*:

The Case of the SS 'Lotus', PCIJ, Series A, No 10, Judgment of 7 September 1927

In this case the Court was looking for the existence of a customary law granting enforcement jurisdiction to ag States in respect of high-seas collisions. If such a rule was discovered Turkey would have been in breach of international law since it had prosecuted a French national on board a French vessel. Accordingly, the Court examined relevant State practice, but not necessarily to nd a rule permitting the exercise of jurisdiction by a non-ag State. It was also content if it was unable to nd a rule prohibiting the exercise of such jurisdiction. It is worth quoting the corresponding text: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed*.' (p 18)

The last sentence, the so-called *Lotus principle*—namely, 'whatever is not prohibited is per- mitted in international law'—has underpinned the international legal system for a long time. However, it is true that due to the multiplication of States and international organizations, and the broadening of the subject matter of international law since the *Lotus* era, inter- national law has gradually evolved and become more complex. For example, it no longer relies on custom as its predominant source, but rather on treaties. It has also come up with other non-binding agreements, eg Memoranda of Understanding, or other declarations or soft law instruments

that re ect more exible approaches. More importantly, it has placed the human being at the centre of its attention since the mid-twentieth century by virtue of the growth of human rights law.

Additionally, international society has established institutions that endeavour to play a rather constitutional role in international relations. Premised upon the domestic 'separa- tion of powers' model, the UN General Assembly (GA) is a plenary organ where States can discuss international issues, complemented by the UN Security Council, an executive organ that may take forcible action in case of a threat to international peace and security. Finally, the International Court of Justice (ICJ) is an international court where States can settle their disputes. However, these institutions do not establish an order similar to a constitutional one,

since the GA does not adopt binding rules and recourse to the ICJ is contingent upon the consent of the parties to a dispute. Finally, the police powers granted to the Security Council are subject to the veto of its ve permanent members.

Thus it remains to be seen how the international community will evolve in the twenty- rst century. Undoubtedly, new forms of cooperation and new international actors or participants may arise. Also, it is more than certain that the subject matter of international law will con- tinue to increase and areas, such as the global commons (space, high seas, deep seabed), or fields, such as international economic law, will attract more attention.

Fragmentation

Brief mention should be made of the problem of fragmentation of international law. Due to its horizontal structure, it is possible for several legal regimes (ie foreign investment law and human rights law) to exist and develop in isolation of each other, ultimately culminating in the production of divergent rules of international law. This possibility is enhanced by the proliferation of international courts and tribunals that may produce divergent decisions on substantial matters. Moreover, as there is no *lis pendens* rule in the international legal order, there is the danger that one single case may end up in several courts and tribunals, all of which may decide the case differently. For example, different aspects of the same dispute between the UK and Ireland concerning the *Mox Plant case* were submitted at the same time to arbitration under the UN Convention on the Law of the Sea, arbitration under the OSPAR Convention, finally ending up before the European Court of Justice (ECJ).

The International Law Commission decided to address this issue and established a Study Group under Professor Martii Koskenniemi on 'Fragmentation of International Law: Dif culties Arising from the Diversi cation and Expansion of International Law'. In 2006, it published its report, which included various methods of obviating such diversi cation of international rules, such as the use of the interpretive tool of Art 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT) or the norms on the resolution of con ict, such as *lex specialis* or *lex posterior*.

Equally important is the knowledge of the case law of all international courts and tri- bunals as well as what has been designated as 'inter-judicial dialogue'. When international or national courts decide upon a case concerning a speci c and delicate issue of interna- tional law, they should be aware of what other courts or tribunals have held on this issue and decide accordingly. This does not mean that they have to adopt the exact same position, albeit to enter into a line of argumentation, which would conduce to the unity and coher- ence of the international legal system. For example, when the ICJ ruled upon the degree of control required for certain acts of individuals to be attributed to a State (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007)), it disassociated that case from the

one decided upon by the International Criminal Tribunal for the former Yugoslavia (ICTY) (*Prosecutor v Duško Tadić* (1999)), and thus justi ed the adoption of the criterion of 'effec- tive control' rather than of 'overall control'.

Article 103 UN Charter

Another facet of hierarchy in the international legal system is Art 103 UN Charter. This provision is the key mechanism for enforcing sanctions adopted by the Security Council under Art 41 UN Charter. It sets forth that 'in the event of a con ict between the obliga- tions of the Members of the United Nations under the present Charter and their obliga- tions under any other international agreement, their obligations under the present Charter shall prevail'. In other words, when the Council adopts a binding resolution ordering the imposition of sanctions against a State, including the freezing of any assets, UN member States would not be in breach of their international obligations under other bilateral or multilateral agreements in implementing this resolution. This does not mean that con ict- ing obligations are terminated; rather, they are simply suspended as long as the sanctions are in force. As a result, States implementing their obligations under the UN Charter are not considered in breach of other con icting obligations (particularly non-performance) contained in other treaties to which they are parties.

Article 103 has served as the legal basis for the implementation of numerous sanctions regimes imposed by the UN since the 1990s. Nonetheless, it was recently held by the ECJ that Art 103 cannot trump *jus cogens* norms. In *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (2008), the ECJ ruled that the EC reg- ulation embodying the sanctions against Al-Qaeda imposed by SC Res 1267 was in breach of the right to be heard and the right to an effective remedy. According to the ECJ, these rights constitute fundamental principles of international law which not even the Security Council can ignore.

Looking for extra marks?

When there is a con ict between a *jus cogens* and a *jus dispositivum* norm, the former should, in principle, prevail. However, there have been cases before the European Court of Human Rights (*Al-Adsani v UK* (2001)) and the ICJ (*Jurisdictional Immunities of the State, Germany v Italy: Greece intervening* (2012)), in which this has not been obvious. Both cases concerned the ostensible con ict between *jus cogens* norms, eg war crimes or torture, and the principle of State immunity. The latter was considered essentially of a procedural character and hence in no direct con ict with the substantive *jus cogens* rules. In case now of a con ict between two *jus dispositivum* norms, one may resort to classic Latin maxims that are also applicable in the international system:

(a) *lex specialis derogat legi generali*, ie a special legal regime has priority over a general law; and

Key debates

Topic	Formalism and the sources of international law
Author/Academic	J D'Aspremont
Viewpoint	The theory of ascertainment which the book puts forward attempts to dispel some of the illusions of formalism that accompany the delimitation of customary international law. It also sheds light on the tendency of scholars, theorists, and advocates to de-formalize the identification of international legal rules with a view to expanding international law. The book seeks to revitalize and refresh the formal identification of rules by engaging with the postmodern critique of formalism.
Source	*Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011)

Topic	Fragmentation
Author/Academic	B Simma
Viewpoint	In his view, irrespective of whether we are in the presence of an emerging system or an uncoordinated mess of diverse mechanisms, the fact is that the present state of affairs, characterized as an 'explosion of international litigation and arbitration', has not led to any significant contradictory jurisprudence of international courts; such cases remain the exception, and actually courts have gone to great lengths to avoid contradicting each other.
Source	'Fragmentation in a Positive Light', 25 *Michigan Journal of International Law* (2003–4) 845

(b) *lex posterior derogat legi priori*, namely, the more recent law overrides an older law.

Revision tip

International law sets out obligations that may differ in nature and legal consequences. The most signi cant difference is between peremptory norms of international law (*jus cogens*) that are not susceptible to derogation and other norms of international law (*jus dispositivum). Jus cogens* norms encompass fundamental principles of the international legal order, such as the prohibition of aggression, torture, and genocide. Such norms impose obligations *erga omnes* upon States or international organizations, namely obligations owed to the international community as a whole. *Erga omnes* obligations are not contractual.

Sources of international law

Sources of public international law address the question 'where do we nd the rules of international law?' Municipal rules are derived from legislation enacted by Parliament, other legislative bodies, or the common law as expressed by judicial precedent. The law of the land, thus created, embodies a set of rules, whose validity we accept because they come from these sources.

The sources of international law are different from their municipal counterparts. There is no parliament to enact legislation or a constitution setting out a legislative process; moreover, judicial decisions do not create binding precedent. In this horizontal, as opposed to vertical, structure of the international legal order, the role of sources gains increased importance. At the international level, recourse will be made to what States usually do in their international relations with a legal conviction (custom) and to what States agree in written form between themselves (treaties). In addition, general principles of law common to many nations may prove of assistance in cases where there is no treaty or custom. These are