Introduction

This book is intended to introduce International Relations (IR) students to the complexities of international law. It emphasises the different ways of looking at international law, in terms of what it is, how it works and how it changes. This book is also intended to introduce International Law (IL) students to the complexities of international relations and, in particular, to the various ways that IR scholars have conceived the dominant structures, main actors and driving forces of world politics. To these ends, we seek to do three things:

(1) to situate international law in its political and historical context;
(2) to give students a foundation in the main theories of IR and IL;
(3) to enable students to apply those theories to the study of the main empirical areas of IL.

It should be immediately obvious that this is not a straight-forward, 'black-letter' law book. It does not seek to provide a definitive account of international law. There are a number of excellent books by eminent international lawyers that attempt to do just this.[1] In other words, this book will not provide students with a single perspective on international law, nor will it provide a fully comprehensive guide to all aspects of international law. Rather, it seeks to develop in students a working knowledge of the various perspectives that scholars have taken on international law. Full discussion of the historical, political and theoretical contexts of international law has necessitated some sacrifices in terms of the breadth of our empirical coverage. Thus, some major topics in black-letter books on international law – such as, the law of the sea, territorial sovereignty and state responsibility – are not dealt with in this book. However, we do cover those main empirical areas where, in our judgement, international law and world politics most vigorously interact; these being, use

[1] Ian Brownlie, *Principles of Public International Law*, 6th edition (Oxford: Oxford University Press, 2003); Malcolm Shaw, *International Law*, 6th edition (Cambridge: Cambridge University Press, 2008); Antonio Cassese, *International Law*, 2nd edition (Oxford: Oxford University Press, 2005).

of force, human rights, international crimes, international trade and the environment.

To be sure, recent dramas in all these areas have brought into sharp relief the importance of international law in the contemporary world. Domestic and international debate on the United States (US) led war against Iraq in 2003 centred as much on the legality as on the strategic efficiency of war. Humanitarian law has provided the benchmarks for critical scrutiny, and hence open criticism, of the treatment of detainees by the US government in its self-proclaimed global war on terror, as well as the conduct of military operations by coalition forces in Afghanistan, Iraq and Libya. At the same time, the growing culture of human rights provided a central narrative justifying the coalition campaigns against the Taliban in Afghanistan and Saddam Hussein's and Muammar Gaddafi's brutal dictatorships in Iraq and Libya. For many states, the management of trade is a bigger concern than the management of armed conflict. Multilateral management of international trade occurs within the legal framework of the World Trade Organization (WTO). Moreover, even this dry and technical area of world politics has attracted much public attention in recent years, as dramatically shown by the anti-globalisation riots in Seattle during the WTO meeting there in 1999. Likewise, highly technical legal regimes to protect the environment, especially the 1997 Kyoto Protocol on climate change, have high salience in public and political debate.

As we shall discuss, the foundation of the modern discipline of IR rested on a rejection by leading scholars such as E. H. Carr and Hans J. Morgenthau of the significance of international law. Writing in the lead up to and just after the Second World War (WWII), these 'realist' scholars argued that, when it came to the crunch, international law had no impact on state behaviour. Indeed, for realists, the failure of the League of Nations to prevent the outbreak of WWII vividly demonstrated how foolhardy it was to place much faith in international law. As the discipline of IR developed, so scholars from other perspectives challenged this grim realist reading of the world. Debate continues to this day between realist and liberal scholars concerning the impact of regimes (many legal in foundation) on international relations. However, it is hard to credit the argument that international law has no impact on contemporary world politics and that states can do as they please. In recent decades the legal regimes on use of force, human rights, international crimes, trade and the environment have all deepened and expanded in scope through evolving state custom and new treaty-law. Furthermore, whilst states remain central actors in developing the law in these areas, a number of non-state

authoritative bodies now play crucial roles in clarifying state rights and obligations under customary and treaty law; such bodies include, the International Court of Justice, the United Nations Security Council, the European Court of Human Rights, the Appellate Body of the WTO and the new International Criminal Court. Increasingly, non-governmental organisations (NGOs) are also able to exert influence through national coalitions and transnational networks in getting states to honour existing legal obligations and to create new rules in all of the areas of international law studied in this book.

Given these developments and recent dramas, it is small wonder that there have been a number of books in recent years that have sought to bridge IR and IL.[2] Many of these have been edited volumes, in which scholars have facilitated the dialogue between disciplines by including IR and IL.[3] It is precisely this dialogue that brought us together for this book. David Armstrong and Theo Farrell are both scholars of IR, and Hélène Lambert is a Law scholar. Dialogue was further aided in the early stages by us all being at the University of Exeter when the project started.

The first two chapters of the book place international law in political and historical context. Chapter 1 provides a general discussion of the nature of international law. In this, we discuss the place and purpose of law in world politics. We introduce students to the main theoretical approach of each discipline – realism in IR and positivism in IL – which we present here as offering rival views of the world (in Chapter 3, we then reveal similarities in their fundamental assumptions about the world). We also situate international law in its normative context by introducing the idea of international society and examining its various political and cultural dimensions.

Chapter 2 discusses the historical evolution of international law. Rules relating to diplomacy and treaties are apparent from ancient times,

[2] Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999); Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Oxford: Rowan and Littlefield, 2005); Shirley V. Scott, *International Law in World Politics: An Introduction* (Boulder, CO: Lynne Rienner Publishers, 2004).

[3] David Armstrong, Theo Farrell and Bice Maiguashca, (eds.), *Force and Legitimacy in World Politics* (Cambridge: Cambridge University Press, 2006); Biersteker, Thomas J., Peter J. Spiro, Chandra Lekha Sriram, and Veronica Raffo, (eds.), *International Law and International Relations: Bridging Theory and Practice* (London: Routledge, 2007); Michael Byers, (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000); 'Legalization and World Politics', special issue of *International Organization* 54 (2000); Christian Reus-Smit, (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

usually supported by the 'sanction' of divine retribution for oath-breakers. As more extensive commercial and cultural links develop, so do more complex legal systems emerge, although whether a true 'legal order' exists in ancient times is more open to question. It is only with the emergence in the Middle Ages of the concept of sovereign equality that something resembling the contemporary international legal system begins to appear.

Chapter 3 introduces the theories and themes that provide the framework for the rest of the book. Our strategy for bridging the disciplinary divide between IR and IL centres on the use of theoretical 'lenses' through which to view the nature and function of international law in world politics. In so doing, we want students to appreciate how theory frames one's subject of study, illuminating particular problems and processes. In Chapter 3, we survey the major theoretical approaches to IR and IL and from these we generate three interdisciplinary 'lenses' – realist, liberal and constructivist. We do not set out to 'prove' a particular theoretical approach, but rather to demonstrate what each approach 'tells us'.

Chapter 3 also lays out three substantive themes for our empirical study of international law. The first theme addresses the content of the law. International law is most commonly seen as a system of rules to guide state action. But liberal scholars argue that it must also encompass a common set of progressive values. More recently, some scholars have suggested that international law also provides the discursive resources that enable states to express their identities and engage in meaningful interaction. The second theme concerns why states (and other actors) comply with international law. Understandably, this question is of central concern to IL scholars. Explanations range from state consent, to notions of fairness, to internalisation of international law in domestic legal systems. The third theme deals with change in international law. Generally speaking, law is more characterised by stasis than change. The stability of law gives it prescriptive force. But ultimately, to function effectively, law must keep up with society. In terms of the international society, change has been all too evident in the increasing codification of customary rules, and creation of new treaty-based regimes, since the turn of the twentieth century. In looking at legal change, we focus on the various agents (e.g., states, international judicial bodies and NGOs) and processes (e.g., treaty-negotiation, policymaking, and state learning) involved.

Chapters 4 to 8 deal with international law on, respectively, use of force, human rights, international crimes, international trade and the environment. These chapters are structured around the themes of content, compliance and change in international law. We use our realist, liberal and constructivist lenses to guide the discussion within each theme.

Our goal, therefore, is not only for students to be familiar with the law on crucial matters from armed conflict to trade, but, more importantly, to understand the different ways of looking at the nature and functions of international law. The law matters for world politics as never before. We aim to show students the various ways in which this is true.

Part I

The foundations

1 The nature of international law

Two kinds of theoretical perspectives have frequently been employed to cast doubt on the significance of international law. The first, which is located within the branch of legal theory known as 'positivism', argues, in essence, that law as such is distinguished from broader and looser normative structures by its imperative nature. In the most famous version of this, by the nineteenth century English jurist, John Austin, 'law properly so-called' is the command of a sovereign backed by coercive sanctions. Since states in the international system acknowledge no sovereign body other than themselves and since powerful states cannot be forced to take or refrain from taking actions against their will, international law cannot be considered true law. As Austin puts it, the duties which international law imposes do not have the obligatory character of true law because they 'are enforced by moral sanctions, by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected'.[1] The second theoretical perspective is drawn from that body of theoretical reflection within International Relations (IR) known as 'realism'.[2] This asserts that states exist in an overall context of international anarchy that impels them towards ceaseless competition in pursuit of their separate interests. In the inevitable struggle for power that ensues, neither moral nor legal principles will significantly constrain states and cooperation among them will always be limited and short term. The political conditions necessary for an effective legal system to exist are, therefore, absent in international society.

If, however, we move from theoretical discourse to 'real world' developments, especially since 1945, we are confronted with an apparent paradox. Not only have the number of areas in which international rules

[1] John Austin, *The Province of Jurisprudence Determined*, edited by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995).
[2] To be distinguished from 'realism' in legal theory, a mainly American school of thought which emphasises what judges and other legal actors actually do, rather than legal doctrine, as the essence of law.

appear to play an important part grown rapidly, but an increasing number of those areas are characterised by the emergence of fully fledged legal systems, including various kinds of courts. Moreover, states appear to take these rules seriously. Indeed, 'it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'[3] and often, when they do not, they devote significant resources to try to demonstrate that some act deemed 'illegal' by commentators or other states does in fact accord with the relevant rules of international law. Even Austin acknowledges that 'every government defers frequently to those opinions and sentiments which are styled "international law"'.

In this chapter we consider, first, some of the counter-arguments that have been advanced to Austin, especially the most comprehensive of these: the work of Hans Kelsen. Next we consider different perspectives on the larger context within which the politics of international law take place: one that emphasises the key role of power, one focusing on various social, cultural, political and economic factors, and one discussing the societal location of international law, where we discuss the concept of an international society of states. We then briefly outline the various processes and institutions involved in international law making. We conclude by further developing the classic IR notion of an international society to take account of the part played by the professional culture of the main participants in international society and the insights of students of communication, human reasoning and linguistic formulation.

The foundations of international law

This central conundrum about the legal nature (or lack of it) of international law has preoccupied thinkers for at least two hundred years. Several distinct lines of argument have been employed in opposition to Austin's thesis. One critique focuses upon his definition of 'law proper', arguing that this oversimplifies and distorts the actual nature of law and legal obligation. For example, in common law systems new rules (or new interpretations of old rules) may emerge from precedents set by important cases or in the course of appeals to higher courts, neither of which processes really qualify as the command of a sovereign. Similarly, few of the statutes laid down by supreme legislatures – what Austin has in mind when he talks of 'commands' – are so unambiguous or of such timeless validity, however circumstances and opinions may change, as to leave

[3] Louis Henken, *How Nations Behave: Law and Foreign Policy* (New York and London: Praeger, 1968), 42.