

complete

International Law

Text, Cases, and Materials

Second edition

Ademola Abass

LLM (Cantab), PhD (Nottingham)

Fellow of the Cambridge Commonwealth Society

Adjunct Professor of International Law

University of Leuven, Belgium

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© Oxford University Press 2014

The moral rights of the author have been asserted

1st edition 2012

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Public sector information reproduced under Open Government Licence v1.0
(<http://www.nationalarchives.gov.uk/doc/open-government-licence/open-government-licence.htm>)

Crown Copyright material reproduced with the permission of the
Controller, HMSO (under the terms of the Click Use licence)

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2014934001

ISBN 978-0-19-967907-2

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

1

International law in the modern context

Learning objectives

This chapter will help you to:

- learn in brief the historical development of international law;
- understand the meaning and concept of 'international law';
- appreciate the nature, basis, and function of international law; and
- understand the modern context of international law.

Introduction

Not long ago, international law was regarded as unserious, unenforceable, and something of a 'non-law' discipline. It meant little or nothing then to refer to oneself or be referred to as an 'international lawyer'. International law was regarded as politics dressed in the language of the law—a sentiment also reflected in academia. In most countries, university curricula did not include 'international law' until around the late 1970s. Academic writers rarely wrote about international law, and the few who did so wrote mainly for the benefit of officials of foreign ministries and diplomats, who were mostly concerned with issues relating to consular relations and the protection of aliens in their countries. The rather cynical attitude of most countries towards international law was aptly captured by a famous English adage 'English Law is law, foreign law is fact, and international law is fiction' (restated in *A Contributor* (1995) 54 CLJ 230).

In the last fifty years, however, international law has witnessed a radical transformation. Not only is it the fastest growing of any legal discipline today, it is perhaps the most fashionable of all legal disciplines for law students to pursue. From its relative obscurity as a discipline developed mainly for the convenience of States and of which 'the great majority of the lawyers of all states [knew] little or nothing', as Oppenheim once put it (see 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313, 323), international law has grown into the most effective weapon for preserving global peace and security. Today, international law regulates not only how States behave towards one another, but also how States deal with their own subjects, especially concerning the protection of human rights, even within a State's own territory. This chapter provides a concise discussion of what international law is all about. It analyses the basis, nature, and ramifications of international law, and considers how international law has become such a powerful tool for regulating interstate relations, and how its rules and principles are now applied across civilizations, religions, and cultures all over the world.

1.1

A brief history of international law: a distinction between the 'origin' and 'documentation' of international law

There is an extensive literature on the history and development of international law. However, 'history' depends on who is telling it, for what purpose, and for the benefit of which audience. For example, it is customary for most textbook writers to begin chronicling the origin

of international law by referring to developments in Western society. Some writers say that international law, properly so called, *began* with the conclusion of the Peace of Westphalia in 1648, which ended the Thirty Years War in Europe. Some locate the birth of international law in the post-Renaissance period or the classical era in Europe. Other accounts have provided more or less recent narratives than these dates.

One common trend in most historical accounts of the origin of international law is the tendency for writers to confuse the period when the *formal documentation* of international law began with when international law, as a distinct legal field, emerged. These are two remarkably different issues that must not be confused. It is important to distinguish between saying that international law, as *used in modern times*, began to *grow* from the second half of the Middle Ages, and saying that international law actually *began* in the Middle Ages.

In Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Vol. 1: Peace* (9th edn, London/New York: Longman, 1996), p. 4, it is stated that:

As a *systematised body* of rules [international law] owes much to the Dutch jurist Hugo Grotius, whose work, *De jure belli ac pacis libri tres*, appeared in 1625, and became a foundation of later development. [Emphasis added]

This is a widely accepted view of when international law started to be properly *documented and systematized in contrast to when it actually emerged*. It is important to maintain this type of distinction, in order to ensure the accuracy of historical analysis.

For many reasons it is difficult to speculate when international law was actually born. For instance, the Chinese are among the various peoples credited with inventing the art of writing, even if it was perfected elsewhere. Nonetheless, the various Chinese languages were not accessible to a great part of the world until fairly recently. In this situation, how can one be sure what the early Chinese scholars wrote about international law or State relations, or if they wrote on the subject at all.

Another difficulty is the question of who documented international law and what parameters were used in determining what constituted international law. Until the twentieth century, the standard for measuring acceptability of civilization was mainly Western. In the *Institutes of the Law of Nations* (1884), James Lorimer classified China as 'barbarous'. In the first edition of his *International Law: A Treatise*, Vol. 1 (London: Longman: 1905), pp. 32–34, Oppenheim ranked European States as number 1, American States, Liberia, and Haiti as number 2, Turkey number 3, Japan number 4, and Persia, Siam, China, Korea, and Abyssinia as number 5. He specifically pronounced that countries in the lower category have not raised their civilization to the level of the Western States. In 1955, H. Lauterpacht (ed.), *Oppenheim's International Law: A Treatise, Vol. 1: Peace* (8th edn, London: Longman, 1955), p. 49, the author added India and Pakistan to the fourth category and removed Korea and Persia from the fifth.

Perhaps this classification reflects the personal opinions of individual authors. However, such opinions significantly affect how the contributions made by others are regarded. (For general discussion, see Xue Hanqin, *Chinese Contemporary Perspectives of International Law. History, Culture, and International Law*, 355 *Recueil des cours* (Hague Academy of International Law, 2012); Sundhya Pahuja, *Decolonising International Law* (Cambridge: Cambridge University Press, 2011).

Authoritative international legal scholars have also shown that the general belief that Hugo Grotius's work was the first *proper* documentation of international law was inaccurate.

According to Jennings and Watts (1996, see section 1.1):

Although he is rightly called the father of the law of nature as well as the law of nations, he has *created neither the one nor the other*. Long before Grotius, the opinion was generally prevalent that above the positive law which had grown up by custom or by legislation there was in existence another law which had its roots in human reason and was therefore called the 'law of nature'.
[Emphasis added]

One major problem with attempting to put a specific date on the origin of international law is that most of what became international law principles already existed among primitive nations long before documentation started. An example is the principle of good faith.

In his book *Histories* (trans. A. de Sélincourt, Harmondsworth: Penguin, 1954), Herodotus, the ancient Greek historian, recorded the early transactions that took place between certain North African tribes. These early transactions, for the most part, constituted a practice whereby commodities were sold between two tribes without as much as an exchange of words. The Carthaginians, who inhabited several cities from the Gulf of Tunis to present-day Tunisia around 1 BC, would arrive in ships, offload their goods onto the beach, send a smoke signal, and then retire. The other tribes would come, inspect the goods, and deposit a sum in gold that they deemed a fair price for the goods. The Carthaginians would return, inspect the gold, and, if satisfied, would take the payment and depart; if not, they would leave both the gold and goods untouched until the other tribe deposited a fair price. This is what Herodotus described in his work as 'silent trading'—but see also Stephen Neff, 'A short history of international law' in Malcolm Evans (ed.), *International Law* (3rd edn, Oxford: Oxford University Press, 2010), at p. 4.

It may be too optimistic to regard this episode as international law proper. Nonetheless, the narrative indicated the evolution of the doctrine of *good faith* amongst 'nations', even if this primitive form did not exactly correspond to the *pacta sunt servanda*. As we will see in Chapter 3 dealing with the law of treaties, this well-established principle of international law enjoins States to implement faithfully those obligations that they assume under international law.

The various instances recalled earlier show the need to be cautious when dealing with historical accounts of the origin of international law. However, by distinguishing the 'origin' of international law from its 'documentation', as Oppenheim did in the previous quotation, we avoid making hasty and often ill-founded conclusions about the 'inception' of international law.

There is little academic benefit to derive from seeking the 'origin' of international law. As such, this book seeks to understand the 'meaning', 'basis', 'nature', and the 'modern context' of international law. Understanding these topics will be of greater benefit to those who are new to the subject than would be an attempt to establish the origin of international law—at least until such time as, as Oppenheim hoped in 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313, 317:

The master-historian, to whose appearance we look forward, will in especial have to bring to light the part certain states have played in the victorious development of certain rules and what were the economic, political, humanitarian, religious, and other interests which have helped to establish the present rules of international law.



thinking points

- Why is it difficult to render accurately a historical account of the origin of international law?
- What should be the focus of any account of how and why international law began?
- What is the importance of Hugo Grotius's early work on the development of international law?

1.2

The meaning and concept of international law

1.2.1 What is 'international law'?

'International law' was believed to have been coined by the British philosopher Jeremy Bentham in 1789, who described it as 'that branch of jurisprudence... [exclusively concerned with] mutual transactions between sovereign as such'. (See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* ([1789] ed Burns and Hart, London: Athlone Press, 1970), p. 297.) This definition embodies the notion of international law in the classical era when the subject was regarded as applying only to States.

During this time, however, some writers believed that international law applied to entities other than States. William Blackstone, an eminent English jurist, was of the view that apart from applying to interstate relations international law also applied to individuals so that the subject applies to 'intercourse which must frequently occur between two or more independent states, and the individuals belonging to each' (W. Blackstone, *Commentaries on the Laws of England* (1st edn, Oxford: Clarendon Press, 1765–69), Book IV, p. 66).

Most modern writers tend to define international law as a body of rules and principles applicable only to States. Let us consider some examples.

According to Olive Parry, 'The function of law in the international community' in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), p. 1:

'International law' is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another.

Section 101 of the Restatement of the Law (Third), Foreign Relations Law of the United States, provides that:

International Law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.

And the *Oxford Dictionary* defines 'international law' as:

the law of nations, under which nations are regarded as individual members of a common polity, bound by a common rule of agreement or custom; opposed to *municipal law*, the rules binding in local jurisdictions. [Emphasis added]

It is nowadays both problematic and outdated to define international law as only applying to States. International law was so defined when it applied only to the relations among nations. If we go back—perhaps to the late nineteenth century, when the proper documentation of international law began—it is obvious that States created international law, through customs that were common in their relation with one another. From this customary practice, States began to record the rules and principles that they wanted to apply in their relations with one another. The first modern type of such records was the 1856 Declaration of Paris, concluded in an effort to end the Crimean War. States were thus the only subjects of international law at these early stages, because they alone were capable of applying its rules and principles, and it was only to them that international law could be applied. For this reason, as we will see in Chapter 4, States remain the most important subjects of international law, making it somewhat accurate to continue to describe international law as the ‘law of nations’.

By the twentieth century, international law application opened wider. Following the International Court of Justice’s Advisory Opinion in the *Reparation for Injuries* case—that international organizations have their own legal personality—they became fully recognized as international law subjects. Even then, Hersch Lauterpacht, who was a great campaigner for the recognition of individuals as subjects of international law, still wrote in 1947 that ‘As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively’ (H. Lauterpacht (ed.), *International Law: A Treatise* (6th edn, London: Longman, 1947), p. 19).

As we will see in Chapter 4, in addition to international organizations, international law now applies to human beings in certain circumstances. International organizations can apply the rules and principles of international law, which can also be applied to them. It is possible to argue that since international organizations consist of States, a definition of international law as applying to ‘States’ invariably includes international organizations. However, as we will see in Chapter 5, international organizations are legal persons and subjects of international law and, as such, they can be distinguished from the individual States that compose them.

A similar opinion was expressed in *Akehurst’s Modern Introduction to International Law* (7th rev’d edn, ed Peter Malanczuk, London: Routledge, 1997), in which Akehurst noted that, during the years between the two World Wars, writers had no difficulty defining ‘international law’ as the law governing the relations between States. However, he said (at p. 1) that this definition:

did not reflect the reality even at that time. The Holy See, although not a State, was recognized to have international legal personality, and so, for certain purposes, were insurgents and some forerunners of modern international organizations. Since the inter-war period, the matter has become more complicated due to both the expansion of the scope of international law into new areas and the emergence of actors other than states on the international plane, such as inter-governmental organizations established by states, non-governmental organizations created by private individuals, transnational companies, individuals and groups, including minorities and indigenous peoples.

The extension of international law definition to cover entities other than States must be handled with caution. While international law can be applied to or against natural persons—for example, under the Rome Statute of the International Criminal Court (see Chapter 16)—human beings cannot apply international law in the same way that States and international

organizations can. Thus, despite the fact that certain categories of human being (including diplomats, staff of international organizations, among others) enjoy some international rights and privileges that ordinary people do not, they cannot appear before the International Court of Justice (ICJ), or conclude treaties on their own behalf, although they can do so as State officials. Furthermore, individuals cannot open diplomatic missions (embassies, high commissions, etc.) in foreign countries, no matter how important they may be. Therefore we need to be cautious when we describe individuals as ‘subjects’ of international law for the purpose of defining international law. In truth, they are international law subjects only because international law can be applied to them under given circumstances; they cannot apply the rules of international law in their own relations, and, as such, are not on the same platform as States and international organizations as subjects of international law.

Nevertheless, it is no longer correct to continue to define international law as rules that apply to States alone, even if States remain the most important subjects of international law. Thus, in light of the shortcomings in the various existing definitions of international law, we propose to define international law, for the purpose of this book, as:

a body of rules and principles, contained in various sources, including treaties and customs, which the subjects of international law have accepted as binding on them either in their relations with one another per se, or in those with other juristic or natural persons.

This definition is distinguishable from most of the existing definitions in many ways:

- it recognizes that international law applies to entities *other* than States;
- it lists the main sources of international law—treaties and customs—but is not limited to these;
- it reveals that the authority of international law derives mainly from the *acceptance* of its binding force by its subjects; and
- it demonstrates that international law does not regulate only the relations of one State with another, but also governs the relations of States with humans and juristic persons (whether nationals or foreigners).

thinking points

- Explain the meaning of international law as the ‘laws of nations’.
- List which entities other than States may apply international law and those to which international law may apply.
- To what extent does the proposed definition of international law improve upon or detract from other definitions of international law with which you are familiar?

1.2.2 Public and private international law: a distinction

As a concept, we use the phrase ‘international law’ rather loosely to refer to two distinct areas of a legal discipline. On the one hand, when we say ‘international law’, we may mean ‘public international law’—that is, the law of nations, which, as discussed previously, concerns relations among subjects of international law.

example

Let us suppose that two fictional States, Candoma and Rutamu, regularly conduct relations with each other and that they each have an embassy on the other's territory. Thus the exchange of diplomatic officials between these countries, the conclusion of treaties regulating the treatment of nationals of one visiting the territory of the other, the adoption of rules and principles for dealing with the commercial enterprises of one country carrying on business in the other, and so on, are all matters for public international law. This is because such matters involve the application of certain rules and principles of international law to the two States. The rules and principles are 'public' because neither State can claim *ownership* of them; rather, they are rules agreed upon by both Candoma and Rutamu alone, or in conjunction with other States.

On the other hand, when we say 'international law', we may, in fact, mean 'private international law', otherwise called 'conflict of laws'. This is a branch of international law that deals with relations between individuals or legal persons, such as corporations, in which the laws of more than one State may be applied. Private international law, or conflict of laws, concerns rules developed by States to deal with such matters as transactions involving private nationals of one State and another State, which may contain some foreign elements.

example

Let us imagine that X and Y are Candoman citizens who married in Candoma, but live in Rutamu. Their children were born in Rutamu and they carry on business activities in that country. In a divorce proceeding between X and Y instituted in a Rutamuan court, the resolution of issues concerning the custody of their children, the distribution of property owned by the couple, and the disposition of their resources will involve a consideration of the law of Candoma, under which the couple were married, and that of Rutamu, under which their children were born and under which they and their children reside, and under which they practise their business. It is the interaction of the laws of Candoma and Rutamu, and the consequences arising therefrom, that are referred to as 'conflict of laws', or 'private international law'.

NOTE Although the laws of two States (Candoma and Rutamu) are involved in the divorce proceedings between X and Y, the case is not *actually* between these two States. Rather, the case is about how Candoman nationals who, despite having married in Candoma, must have their marriage dissolved in their country of domicile, Rutamu, which, nevertheless, must consider how Candoman law deals with certain issues arising in the proceedings.

Distinguishing between 'public' and 'private' international law does not imply that these two aspects of international law are always mutually exclusive, or that they operate independently of each other at all times. On the contrary, there are circumstances in which certain aspects of these two 'international laws' interrelate, and in which one may be relevant in determining whether a breach of the other has occurred.

In Jennings and Watts (1996, see section 1.1), at p. 7, it was said that:

Although the rules of private international law are part of the internal law of the state concerned, they may also have the character of public international law where they are embodied

in treaties. Where this happens the failure of a state party to the treaty to observe the rule of private international law prescribed in it will lay it open to proceedings for breach of an international obligation owed another party. Even where the rules of private international law cannot themselves be considered as rules of public international law, their application by a state as part of its internal law may directly involve the rights and obligations of the state as a matter of public international law, for example where the matter concerns the property of alien or the extent of the state's jurisdiction.

NOTE It must always be borne in mind that this book is concerned only with public international law and not private international law.

This is a very important observation. Indeed, situations may arise in which failure to apply the rules of private international law may be regarded as a breach of public international law. As will be seen in Chapter 3, States accept certain private international law rules as governing their international relations and such rules may involve private international law issues. Therefore if a State fails to apply a private international law rule embodied in a treaty to which it is a party, that failure may be considered to be a breach of an international obligation agreed upon by the two States, which, in effect, constitutes a breach of public international law.



thinking points

- Distinguish between 'public' and 'private' international law.
- Are public and private international laws mutually exclusive?
- Name one circumstance under which the failure to apply a private international law rule can give rise to a breach of public international law.

1.2.3 General, regional, and particular international law

Aside from the distinction between public and private international law, a further categorization (although not a distinction as such) can be made in the operations of public international law. While there is a general body of rules and principles that makes up public international law, the operation of these rules and principles may sometimes vary. Generally speaking, international law rules may operate globally, but they may also be restricted to specific regions of the world. Usually, international law applies to a vast majority of States all over the world; nonetheless, there are certain rules that are peculiar to particular regions of the world. Thus we often speak of 'general' international law and 'regional' international law in respect of the universal or regional application of international law.

The basis of the distinction between 'general' and 'regional' international law lies mainly in the scope of the application of international legal rules, as well as the number of States involved. General international law usually applies to a greater majority of States in *all regions* of the world. Regional international law may also apply to a considerable number of States (although they are usually fewer than those involved in 'general international law'), but the States are usually located within a single region of the world.

Whereas the rule prohibiting the threat or use of force by States (see Chapter 10) is an example of general international law, because it applies to all States regardless of the region in which they are located, the 'Estrada' doctrine, which concerns the 'recognition of States' (see Chapter 4), originated from and initially operated only in Latin America. However, more

States elsewhere have now adopted the doctrine. Another example of regional international law can be seen in the requirements set for new entities aspiring to become States in Europe, under European Union law, in addition to fulfilling the criteria of statehood under the 1933 Montevideo Convention. These new rules apply only in Europe (see Chapter 4).

It is also possible to describe some rules of public international law as ‘particular international law’. This refers mainly to rules that are accepted by only a few States, but which are not confined to a particular region of the world. Such a rule is not ‘regional international law’, since the few States that subscribe to it are not necessarily confined to the same region (in which case, it would be ‘regional international law’ notwithstanding the small number of States). Thus referring to such a rule instead as ‘particular international law’ accurately represents the fact that it applies only to a few States, unrelated to their geographical location.

The bulk of international legal rules are applied on a universal basis. Examples of such rules can be found in eminent international treaties such as the Charter of the United Nations (UN Charter) and various human rights treaties—especially the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, general international law rules can be found in such specific legal regimes as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).

Although ‘regional’ or ‘particular’ international laws are subservient to general international law, there are occasions when regional or particular international law obligations clash with general international law obligations. In order to avoid such situations, general international law often regulates the relations between itself and its subcategories (see Chapter 2).

Article 103 of the UN Charter provides: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

This provision relates specifically to the obligations of UN member States under *any other* international agreements, but such *other* international agreements include those that apply either among a few States or in a particular region. The other obligations of the UN member States over which their Charter obligations take precedence might be obligations under general international law (outside those of the UN Charter), regional international law, or particular international law. This means that even within the class of general international law, the obligations assumed by States under the UN Charter (which embodies general international law) are superior to their obligations under other agreements, which may also embody general international law.

Further, Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) states that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

As will be discussed fully in Chapter 2, a peremptory norm—otherwise called *ius* (or *jus*) *cogens*—is widely regarded as the most fundamental norm of the international community, breach of which shakes the very foundation of human civilization. Examples of such norms include the prohibition of the slave trade, genocide, and the use of force by States. Peremptory

norms are therefore rules of general international law and may not be contradicted by any other rule, whether regional or particular international law. However, a peremptory norm may be replaced by another norm of international law having a similar character, pursuant to the provisions of Article 64 VCLT.

'Regional' and 'particular' international laws are not as popular today as they were in the past. This is partly because almost all States are now members of the United Nations, and partly because the existence of regional customs are being successfully challenged before the ICJ (see Chapter 2). In a fast globalizing world where States are constantly expanding their areas of cooperation, it is becoming increasingly difficult for a few States to claim that they accept customs or rules not open to the vast majority of States.

KEY POINTS

- 'General international law' means a body of rules and principles of international law that applies among a vast majority of States.
 - 'Regional international law' refers to the rules and principles of international law that apply to States within a particular region of the world (for example, the Estrada doctrine).
 - 'Particular international law' refers to the rules or principles of international law applicable to a few States regardless of where they are located.
 - The use of both 'regional' and 'particular' international law has decreased considerably in modern times.
 - It is often very difficult for States to prove the existence of a regional or particular custom, especially in matters involving States that are not located within the same region.
-



thinking point

Distinguish between 'general', 'regional', and 'particular' international law.

1.3

The nature of international law: theories

Across generations, legal scholars, philosophers, thinkers, and political scientists have propped various theories about the nature of international law in order to better understand its functions, characteristics, and limitations. The most important and influential of these are the naturalist, the positivist, and the Grotian schools. This does not constitute an exhaustive list, but are only three of the many schools of thought that put forward different theories about the nature of law and through which the nature of international law may be better understood.

1.3.1 Naturalism

According to naturalism, there is a law of nature that applies to States just as such law applies to individuals. In proposing that a *law of nature* applies to States and individuals, the naturalists oppose the idea that States *voluntarily*, in their conduct with one another, should

be bound by laws that they either make themselves or which they observe by custom. Consequently, naturalists believe that all other types of law—including those that are man-made—must conform to a higher (natural) law. Some eminent members of the naturalist schools included Pufendorf, Hobbes (who would later become a positivist), Rutherford, and Barbeyrac.

In *The Concept of Law* (Oxford: Oxford University Press, 2nd ed 1994), p. 186, H. L. A. Hart, who was actually a positivist, agreed that:

there are certain principles of human conduct, awaiting discovery by human reason, with which manmade law must conform if it is to be valid.

In a nutshell, natural law theory proposes that it is the same law of nature that regulates human conduct that also regulates States in their conduct with one another. It posits that while States, like humans, may make other laws by themselves, such laws must conform to the law of nature in order to be valid. Nonetheless, because the naturalists do not accept that States make the laws that bind them in their conduct with one another, they attracted the title ‘deniers of the Laws of Nations’—that is, they were seen to reject international law.

1.3.2 Positivism

Opposed to the natural law theory is the concept of positivism, a term believed to have been coined in the 1830s by French social philosopher August Comte. Comte used the term *positivism* to mean something ‘scientific’ and ‘objective’, as opposed to something deduced through some religious or speculative means.

However, before discussing positivism as a theory on the nature of international law, we need to remind ourselves that, as a concept, positivism is capable of a wide range of things. In this regard, we can speak broadly of three branches of positivism. According to A. P. d’Entrèves, *Natural Law* (2nd rev’d edn, London: Hutchins & Co., 1970), p. 175, these are:

- imperativism;
- normativism; and
- legal realism.

Although the last two branches have some broad relations to the theory of law, it is ‘imperativism’ with which we are mainly concerned here. Imperativism captures the whole essence of positivism, in that it conveys the notion that the law is a command of a ‘sovereign’ endorsed by the habitual obedience of his or her subjects—a theory generally credited to English legal philosopher John Austin.

Positivists reject the notion of some ‘higher’ or ‘natural’ law to which all man-made laws (positive laws) must conform before they can be valid. For the positivists, States are bound only by those laws that are either man-made (such as treaties) or which derive through customs and are issued by a sovereign. In short, positivism is based on the idea that the law is the command of an uncommanded commander.

1.3.3 Grotianism

The third theoretical school is the Grotian perspective, or 'Grotianism'. As noted previously, Hugo Grotius is credited as being the 'father of international law'. It is not surprising therefore that this eminent international lawyer has a whole school of legal theory dedicated to his name.

The Grotians occupy a middle position between the naturalists and the positivists, regarding neither natural law nor positive law as having any more or any less character than the other. Hugo Grotius saw a possibility of harmonizing the various schools.

In *De Jure Praedae (The Law of Prize)* (1868), Grotius speaks of the need to systematize:

That body of law... which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances or having its origin in custom or tacit agreement... [and to the importance of] a knowledge of treaties of alliance, conventions, and understandings of peoples, kings and sovereign nations... in short, of the whole law of war and peace.

In *The Anarchical Society: A Study of the Order of the World Politics* (London: Macmillan, 1977), p. 27, Hedley Bull observes that the Grotians:

View international law politics as taking place within an international society [in which] states are bound not only by rules of prudence or expediency but also by imperatives of morality and law.

(See also H. Bull, 'The Grotian conception of international society' in H. Butterfield and M. Wight (eds), *Diplomatic Investigations* (Cambridge, MA: Harvard University Press, 1968), pp. 51–73.)

Clive Parry (1968, see section 1.1.1), at p. 26, sums up the main tenets of the Grotian theory of international law to the effect that it attributes 'equal weight to what states actually do, to habit and custom and to the course of dealing between parties, which contribute significantly to whatever system of law; and no less to what states are—or what they must do because of their nature'.

In summary, international law, like municipal law, is regarded as having transcendental, as well as mundane, origins. States agree to be bound by international law when they sign treaties and enter into different types of agreement, and when their practice indicates such agreement. In addition, States are regarded as being bound by certain norms and tenets, such as peremptory norms, not necessarily based on any agreement, but based on the nature of the norms themselves. Grotianism therefore provides a more comprehensive understanding of the basis of international law and its binding nature as law.



thinking points

- Distinguish between 'naturalism' and 'positivism'.
- What does 'Grotianism' stand for? How can it be differentiated from naturalism and positivism?
- In your opinion, which of the theories do you think best represents international law and why?

1.4

The relationship of theories of law with international law

As will have been noticed, the various theories considered previously relate to 'law' in general and not only to international law in particular. This raises the question: how do the theories relate to public international law?

The relevance of these theories to international law manifests in their subtle influences on the various aspects of international law rather than a single, dominant effect. For example, the relationship between international law and municipal or domestic law, which is usually expressed as a contest between monism and dualism (see Chapter 9), can be properly understood only against a sound appreciation of the theories. Whether one believes that international law is superior to domestic law (monism), or that the two are indeed separate and function as such (dualism), depends partly on to what theoretical view of law one subscribes.

Generally speaking, the influence of the above theories on international law today is much less than it was when the discipline began to be systematized. Nonetheless, Grotianism has proved to be the most enduring of all of the theories, especially after the Second World War. The development of a strong international human rights system after the war meant that laws could not simply be viewed as the 'command of an uncommanded commander', nor could it be sharply divorced from morality, as positivists want us to believe. Today, a soldier cannot hope to escape liability for committing heinous crimes during an armed conflict by simply stating that he or she is authorized by his or her superior commander. International law makes efforts nowadays to ensure that every soldier is aware of the laws of war, and that all soldiers behave according to these laws and not simply according to the whims of their commanders. In addition, the idea of the absolute sovereignty of the State as an 'uncommanded commander' in the international forum is being challenged by the development of instances in which international law will, in a sense, pierce the veil of sovereignty and punish offenders for crimes committed in their territory, as will be seen in our discussion of international criminal law. All of these developments in international law have led to a sharp decline in positivism, just as the role played by law in the modern society has equally reduced the efficacy of the belief that some higher (natural) law is all that matters.

KEY POINTS

- The relevance of 'theory' to international law generally declined after the Second World War, due partly to the development of international human rights.
 - The impact of 'theory' on international law can be seen in its influence on specific aspects of international law rather than as an overall effect.
-

The basis of international law: consent

In any given society, laws are made by certain institutions. In democratic societies, laws are made by the legislature, known by different names in different countries. In the UK, for example, the 'Parliament' is divided into the 'House of Commons' and the 'House of Lords'; in the USA, the federal legislature is called 'Congress'; in Nigeria, it is the 'National Assembly', comprising the 'Senate' and the 'House of Representatives'; and in Israel and Russia, they are called 'Knesset' and 'Duma', respectively.

In contrast to domestic legal systems, international law does not have law-making institutions. Hence, man-made laws, in the sense of legislative enactments or Acts of Parliament, do not form the basis of the international legal system; rather, international law is based principally on the consent of those States that agree to be bound by it. It is only when States accept to form international law that international law can exist. How States consent to the formation of international law can, however, vary. States may explicitly agree to set out the rules of international law that they wish to apply and to be applied to them, in their relations, and this can be done in treaties or conventions; such an agreement can also emerge from the customary practices of States. These two modes (treaty and custom) are discussed in Chapter 2.

The origin of 'consent' as the basis of international law is both ancient and modern. It is believed that consensual international law emanated from the practice of the Roman Empire. Thus Clive Parry (1968, see section 1.2.1) at p. 17, notes that:

The *ius gentium* of the Romans—that amalgam of the laws of all the peoples of the empire... having been received over much of the European continent after the Renaissance, constituted an actually operative common system of law providing a basis ready made for international law.

Obviously, consent as a basis of international law was influenced by developments within domestic legal systems, but it took a while before these domestic developments actually registered a meaningful impact on international law.

As Reisman observes in 'Sovereignty and human rights in contemporary international law' (1990) 84 AJIL 866, 867:

It took the formal international system time to register these profound changes. Another century beset by imperialism, colonialism and fascism was to pass, but by the end of the Second World War, popular sovereignty was rooted as one of the fundamental postulates of political legitimacy. Article 1 of the UN Charter established as one of the purposes of the United Nations, to develop friendly relations between States, not on any terms, but 'based on respect for the principles of equal rights and self-determination of peoples'.

It does not follow, however, that every State must give its consent before international law can be established. According to Oppenheim (1908, see section 1.1), at n. 14:

The 'common consent' cannot mean, of course, that all states must at all times expressly consent to every part of the body of rules constituting international law, for such common consent

could never in practice be established. The membership of the international community is constantly changing; and the attitude of individual members who may come and go must be seen in the context of that of the international community as a whole, while dissent from a particular rule is not to be taken as withdrawal of consent to the system as a whole.

John Duggard notes, in *International Law: A South African Perspective* (3rd edn, Cape Town: Juta & Co. Ltd, 2008), at p. 14:

While the notions of justice and the values of legal idealism associated with natural laws form the foundation of much of contemporary international law, particularly the promotion of human rights and the right of self-determination, it cannot be denied that for many states consent remains the basis of their participation in the international community.

As will be seen in Chapter 2, in the case of customs what is required is that a great majority of States gives their consent; in that way the custom comes to be regarded as international law. With treaties, the rule is different: only States that consent to a treaty can be bound by the rules contained in that treaty, subject to notable exceptions. (See also Fernando R. Teson, 'Interdependence, consent, and the basis of international obligation' (1989) *Proceedings of the Annual Meeting of the American Society of International Law*, 5–8 April, pp. 558–566, and Wilfred C. Jenks, 'The challenge of universality' (1959) *Proceedings of the Annual Meeting of the American Society of International Law*, 30 April–2 May, pp. 85–98; Anthony Carty, 'Critical international law: recent trends in the theory of international law' (1991) 2 *EJIL* 66.)

KEY POINTS

- State consent is the basis of international law.
 - Consent as the basis of international law was inspired by developments in domestic law in Europe and the USA.
 - State consent does not imply that all States must give their consent at all times for the purpose of establishing international law; the consent of the majority of States is sufficient.
-

1.5.1 The limits to State consent as the basis for international law

There are instances in which State consent is precluded. These include situations concerning a special class of norms and with regard to some existing customs. We will now consider some examples of these instances.

Consent versus peremptory norm

While State consent is crucial to the formation of international law, there are certain aspects of international law in relation to which State consent is practically irrelevant. Once a norm is categorized as a peremptory norm (that is, the most fundamental in the hierarchy of norms), States cannot consensually derogate from such a norm (see Article 53 VCLT). A State cannot, for example, consent to the commission of the crime of genocide on its territory simply because it has not ratified the 1948 Genocide Convention; neither can a State, in present times, permit

slave trade on its territory for any reason. The proscription of genocide and slavery are now widely regarded as peremptory norms by States, because they are so fundamental to the existence of humankind that a disturbance of them threatens that very foundation. A State cannot also claim that its internationally wrongful act which violates a peremptory norm is precluded by consent. (See Article 26 of the International Law Articles on State Responsibility for Internationally Wrongful Acts, 2001.)

Nevertheless, the fact that only a few crimes belong to the category of peremptory norms demonstrates that it is only for *extraordinary* reasons that State consent can be precluded from operating on international law. Outside these norms, there are no other instances in which State consent is precluded as being the basis of international law. State consent is so powerful that, as we will see in Chapter 13, when States create international law, their consent is even needed before they can be held responsible for its breach. If a State does not accept that the ICJ, for example, should adjudicate a case involving the State's breach of an international obligation that it owes to another State, then there is little that can be done in terms of holding it legally liable. This is one of the main reasons why international law is frequently seen as 'no law', since everything seems to depend on the wishes of States. It is, in other words, considered to have no independent or objective regime of sanctions against recalcitrant States. But, as we shall see later, this is not a true picture of the nature of international law. (See generally Anthony D'Amato, 'It's a bird, it's a plane, it's jus cogens' (1990–91) 6 Conn JIL 1.)

Consent and pre-existing customs

It is often the case that a State accepts the existence of a particular custom in international law. Naturally, this means that the State practises the custom and is bound by it. The question is: what happens to that consent if the State breaks up into several other States? This question is important because, generally speaking, 'new' States are not afforded the opportunity to exercise choice over whether or not they accept that custom. This has led some writers to deny that consent is the basis of international law, since, although such new States have not been given an opportunity to express their consent in respect of such customs, they are nonetheless automatically bound by it.

In an ideal world, it would be desirable for every State to consent to every rule of international law, but this is unrealistic in the modern context in which events occur at an exponential pace. The fact that new States do not have the opportunity to consent to old customs does not *ipso facto* mean that their consent is irrelevant. It does suggest, however, that while consent is the basis of international law, it is not itself sufficient for the purpose of formulation and development of the rules and principles of international law. As John Duggard (2008, see section 1.5) notes, at p. 14:

Consent, on its own, however fails to provide an explanation for the rules and principles that comprise international law. Third World States, for instance, have at no time expressly consented to the rules that shaped international law before they attained independence. Indeed, as consent becomes more difficult to obtain for the creation of new rules of law, consensus in the form of majority decision-making is increasingly adopted.

As will be seen in Chapter 2, if a number of (new) States begin to depart from the existing custom, this raises significant doubt as to the validity and sustainability of that custom in the long run. Also, a new State can be presumed to have accepted a pre-existing customary rule if

such rule relates, for example, to a peremptory norm. The specific consent of that new State will be irrelevant, since the customary rule regarding the peremptory status of a norm derives not by virtue of State consent, but from the fact of the prescient status that the international community has accorded to that norm. Lastly, to argue that State consent is not the basis of international law only because consent appears assailable on a particular occasion is to stretch the relevance of exceptions to breaking point.



thinking points

- What are the possible exceptions to State consent as the basis of international law?
- Do you agree that the fact that new States are not given the opportunity to confirm or reject old customs undermines State consent as the basis of international law?
- What are 'peremptory norms' and why are they excluded from the reach of State consent?

1.6

The functions of international law

So far we have considered a brief history, the nature and the basis of international law, but these do not tell us what international law actually *does*. After all, if we were to ask what functions domestic law performs, we could come up with scores of answers. We might say, for example, that domestic law regulates the relations between people and the State; we might even say that it is a code of conduct that spells out the duties and responsibilities of everyone who lives within a State, including those entrusted with the responsibility for running the State or conducting its affairs. Clearly, these kinds of function make it possible for people to empower specific individuals—legislators—to make laws on their behalf. However, since, as stated previously, the international legal system does not have traditional law-making institutions as such, does it then mean that we cannot expect international law to function in a manner similar to municipal law?

The question what function international law performs has exercised the minds of legal scholars for many years. This is a tricky question because, as observed earlier, international law used to be considered as irrelevant. In 1968, Richard Falk gave as his main reason for investigating the relevance of international law that it was part of a larger effort of 'liberating the discipline of international law from a sense of its own futility' (see Richard A. Falk, 'The relevance of political context to the nature and functioning of international law: an intermediate view' in Karl W. Deutsch and Stanley Hoffmann (eds), *The Relevance of International Law* (Cambridge, MA: Schenkman, 1968), at p. 142).

International law performs many functions, and these include encouraging friendly relations among States, outlawing wars among nations, and promoting the peaceful resolution of disputes among nations. The most fundamental of these is the maintenance of international peace and security among States. This rather sacred function is also underscored by the United Nations.

One of the objectives of the organization, contained in Article 1 of the UN Charter, is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and

in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

According to C. Tomuschat, in 'International law: ensuring the survival of mankind on the eve of a new century' (1999) 23 *Recueil des Cours* 1, 23, international law:

has a general function to fulfil, namely to safeguard international peace, security, and justice in relations between States.

However, expressing the core function of international law as the maintenance of international peace and security neither answers the practical question of how this can be achieved—especially where the need to maintain peace and security conflicts with the attainment of justice—nor explains what the terms used mean in reality. In his chapter 'What is international law for?' in Evans (2010, see section 1.1), p. 32, Martti Koskenniemi rightly queries:

What do 'peace', 'security', or 'justice' really mean? As soon as such words are defined more closely, disagreement emerges. To say that international law aims at peace *between States* is perhaps already to have narrowed down its scope unacceptably. Surely, as Tomuschat [1999, above] asks at p. 33, it must also seek to advance 'human rights as well as the rule of law domestically inside States for the benefit of human beings'. But what if advancing human rights would call for the destruction of an unjust peace?

There is a whole generation of writings on the so-called 'peace versus justice' tension to which Koskenniemi (in Evans, 2010, above) alludes, but this is not our concern. It suffices to note that, originally, international law was not as concerned with the justice of a situation as it was with the maintenance of peace and security. However, this approach has changed, partly because of the increasing pressure that international law imposes on States to ensure that they do justice while pursuing peace and security. For example, it is now common for a State that has experienced civil war or an authoritarian regime to seek to do justice by confronting its past. This mechanism—nowadays referred to as 'transitional justice'—is a process by which post-conflict societies attempt to understand the ills and shortcomings of the past that led to the collapse of the rule of law, so as to devise strategies for how best to address these issues as they build new societies. Transitional justice has featured in post-apartheid South Africa, and post-conflict Liberia and Sierra Leone, as well as post-authoritarian Cambodia.

Another important function of international law is the settlement of disputes among States. With regard to this function, international law does not operate with the same strength or prediction as domestic law. This is entirely due to the consensual basis of international law, as explained previously, and the topic is discussed fully in Chapter 13.

H. L. A. Hart (2nd edn, 1994, see section 1.3.1), at p. 214, underscores this weakness in international law by observing 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.

While it is true that international law lacks institutions such as legislatures and courts, the view that international law lacks unifying rules of recognition specifying sources is open to challenge. In 'Wicked heresies or legitimate perspectives? Theory and international law', in Evans (2010, see section 1.1), at p. 64, Iain Scobbie did challenge Hart on this point:

This view was wrong when Hart first expressed it in 1961. Despite criticism, whether on the grounds of inadequacy or inept drafting, it is generally accepted that Article 38 of the Statute of the International Court of Justice provides at least a starting place for the enumeration of the sources of international law and thus functions as a ‘rule of recognition’ for the international legal system, should one wish to adopt a Hartian analysis.

The category of the functions performed by international law is not closed. It is important that, when engaged in an inquiry into the function of international law, legal scholars should endeavour to be as creative and flexible as possible, and not be over preoccupied by ideas expressed by others.

In ‘International law: content and function—a review’ (1967) 11 *J Confl Res* 504, Anthony D’Amato, remarked about a writer’s over reliance on other people’s views:

From the writer’s point of view, therefore, the possibility of a self-fulfilling prophecy exists. This possibility in turn encourages the writer to incorporate, to a greater or lesser extent, her own ideas of what the law should be into her account of existing international rules. Nor should we be surprised that legal writers invariably do this. For they are, primarily, jurists and not political scientists; they have no particular commitment to scientific detachment, but rather were attracted to their subject for motives such as patriotism, humanitarianism, morality, or merely a passion for ‘tidying up’ the disparate assortment of available international legal rules.

If one accepts this proposition, it is possible to find a great number of other functions that international law could be said to perform, depending on one’s understanding of the subject matter and the context in which international law operates. Anne-Marie Slaughter Burley noted that in 1992 the task of liberating international law from its own futility ‘appears to have been accomplished. International legal rules, procedures and organizations are more visible and arguably more effective than at any time since 1945’ (see Anne-Marie Slaughter Burley, ‘International law and international relations theory: a dual agenda’ (1983) 87 *AIL* 205).



thinking points

- Summarize the main functions of international law.
- To what extent is justice important when international law seeks to maintain peace and security?
- Do you agree with Hart’s view of the function of international law with regards to the identification of its rules?

1.7

What next in international law?

Despite its phenomenal popularity in the last fifty years or so, some still doubt that international law is ‘law’ properly so called. This view derives from a belief that international law is either entirely unenforceable—for example, where a State refuses to give its consent to adjudication before the ICJ or any other international tribunal—or that it is not enforceable against powerful countries. It is true, as we have discussed previously, that States need to give their

consent before the ICJ can adjudicate a matter involving them; thus there is no compulsory jurisdiction, as such, under international law.

Also, there is no denying that the current structure of international law does not make it possible for its enforcement against powerful States. It is idealistic to expect that international law can be enforced as easily against the likes of the USA, the UK, Russia, France, and China as it can against weak and poor States. As we will see later in the book, these rich and powerful States are the five permanent members of the UN Security Council (known as the 'P5') and they enjoy a special status based on their possession of the veto power—that is, a negative vote that each can cast in a decision of the Security Council involving them or any other State. The implication of the vote is to nullify or render it impossible to pass a Security Council resolution in the event of dissent by any of the P5. Therefore the fact that the structure of the system created by the UN Charter creates a distinction between the permanent Security Council members and all other States undermines the effectiveness of international law. To many observers, if all States are equal according to one provision of the UN Charter, certainly those that wield the veto are more equal than others.

The overwhelming sense of frustration about the Orwellian nature of the current international legal order has continued to haunt several generations of international law students. The dilemma for students of international law can be illustrated by the exchange between some international law students on a popular website called 'Answerbag', available at http://www.answerbag.com/q_view/1682. An anonymous writer called 'agnostic' posed the question: 'Is "international law" true law?' on the website, to which several people—apparently mostly international law students—responded. On 12 April 2009, 'little bear' responded: 'I bloody hope so, considering I just dedicated 50+ hours of my life studying it.' And 'firebrand' responded: 'Yes, it is—although not all countries abide by the laws.'

Mapping the future of international law, therefore, invites us to create a fine balance between the question posed by 'agnostic' and the answer provided by 'firebrand'. In reconciling agnostic's doubt and firebrand's reassurance, it must be said that international law is often judged by its failures rather than by its successes. For every single instance in which international law is unable to enforce its measures against powerful States, either for reasons of the veto or lack of capacity to do so, there are several instances in which international law succeeds: when you post a letter in England to France, when you ship an item from Albania to Swaziland, there is international law present, accompanying the post and the freight, guiding all hands that come into contact with the chattels regarding what they can and cannot do with the items; when you sleep in your house and listen to the droning sound of aeroplanes flying overhead, international law ensures that no alien planes invade your country's territory. It is only in recognizing that international law does far more good than is recognized that we can assure 'little bear' that the fifty-plus hours that he or she dedicated to studying the discipline were well worth it.



Conclusion

International law has grown significantly in recent times. From the 1990s, international law made considerable progress, especially in the areas of collective security, human rights, international criminal law, international economic law, and international environmental law, to

mention but a few. The UN Security Council was able to authorize an enforcement action against Iraq when it invaded Kuwait in 1990, a feat that the same institution was unable to achieve in the first forty-five years of the United Nations. Government officials, including heads of State, are no longer able to commit heinous crimes against their nationals, or foreigners, and hide under diplomatic immunity (see Chapter 16). More and more States now take the human rights of their peoples more seriously than they did during the first forty-five years of the UN Charter. Many Arab countries, which have long experienced dictatorship and autocratic regimes, are currently undergoing monumental revolution; in the cases of Egypt, Tunisia, and Libya, that revolution has already led to the replacement of governments. In the Ivory Coast, the United Nations and some of its member States assisted Ivorians in realizing their democratic aspirations by forcing out Laurent Gbagbo from the office that he refused to vacate after suffering defeat in democratic elections.

Nonetheless, there remains significant room for improvement. As international law becomes more assertive in the modern context, more areas emerge in which improvements are required. The future of international law lies notably in how much it is able to harness the general goodwill that it continues to enjoy among the majority of States to the benefit of humankind.



Questions

Self-test questions

- 1 Define 'international law'.
- 2 Explain the difference between 'public' and 'private' international law.
- 3 What are 'general international law', 'regional international law', and 'particular international law'?
- 4 What functions does international law perform?
- 5 Distinguish naturalism, positivism, and Grotianism.
- 6 What is the basis of international law and is this enough for the purpose of international law development?
- 7 Under what circumstances may consent, as a basis of international law, be varied?

Discussion questions

- 1 To what extent is the assertion that international law is not law a true reflection of international law?
- 2 'Without consent, there can be no international law. Consent is the beginning and end of international law.' Discuss.
- 3 Outline the various theories of law and discuss what relevance these have to international law.

- 4 'International law is international law. The use of the terms "private" and "public" to describe international law is a matter of personal preference with no practical consequences.' Do you agree?
- 5 'Understanding positivism, naturalism, and Grotianism as theoretical foundations of law says nothing about the foundation of international law.' Discuss.
- 6 'The future of international law is precarious.' Evaluate this assertion.

Assessment question

Candoma* has recently obtained independence from Rutamu* and, eager to demonstrate that it is now a State in its own right, decides to join the UN. However, the newly elected president of the country is concerned that since Candoma was not a State when the UN was established, it took no part in establishing the rules and principles contained in the UN Charter, which it must accept upon becoming a member of the organization. The opposition party, which lost the election that brought in the new government, is mounting a vociferous campaign against Candoma joining the UN. Among several arguments that the opposition is making are: that international law, which the UN will administer, is no law at all; that it privileges rich and powerful nations; that since international law has no enforcement mechanisms, States will freely violate it, rendering Candoma open to violations without remedy; and that if Candoma does not join the UN, it has no responsibility to respect international law. As an international law student in a prestigious Candoman university currently on internship with the Foreign Affairs Ministry, the minister has asked you to prepare a counter-argument that might be presented when he debates the issues with a representative of the opposition party live on television.

Outline the argument that you would suggest.

* Note that both Candoma and Rutamu are fictional States. They will appear in assessment questions throughout the book.



Key case

- *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356



Further reading

- Coplin, W. D., *The Functions of International Law* (Chicago, IL: University of Chicago Press, 1965)
Duggard, J., *International Law: A South African Perspective* (3rd edn, Cape Town: Juta & Co. Ltd, 2008)

Franck, T., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995)

Hart, H. L. A., *The Concept of Law* (Oxford: Oxford University Press, 2nd ed. 1994)

Higgins, R., *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 2004)

Jennings, R. and Watts, A. (eds), *Oppenheim's International Law, Vol. 1: Peace* (9th edn, London/ New York: Longman, 1996)

Kadduri, M., *War and Peace in the Law of Islam* (Baltimore, MD: Johns Hopkins University Press, 1955)

Kelsen, H., *Principles of International Law* (New York: Rinehart & Co., 1952)

Neff, S., 'A short history of international law' in M. Evans (ed.), *International Law* (3rd edn, Oxford: Oxford University Press, 2010), p. 3

Oppenheim, L., 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313

Parry, C., 'The function of law in the international community' in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), p. 1

Schwarzenberger, G., *The Inductive Approach to International Law* (London: Stevens, 1965)

Preview www.CopyrightedMaterial