Introduction, Ch.1 Foundation of international law, The Nature of International Law

Sir Robert Jennings qc, Sir Arthur Watts kcmg qc

From: Oppenheim's International Law: Volume 1 Peace (9th Edition)
Edited By: Robert Jennings, Arthur Watts KCMG QC

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 19 June 2008
ISBN: 9780582302457

Subject(s):
Erga omnes obligations — Peremptory norms / ius cogens — Customary international law — Peace keeping — Paramilitary groups — Subjects of international law
The Nature of International Law


§ 1 Concept of international law

International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law. International law in the meaning of the term as used in
modern times began gradually to grow from the second half of the Middle Ages. As a systematised body of rules it owes much to the Dutch jurist Hugo Grotius, whose work, *De Jure Belli ac Pácis, Libri iii*, appeared in 1625, and became a foundation of later development.\(^3\)

That part of international law that is binding on all states, as is far the greater part of customary law, may be called *universal* international law, in contradistinction to *particular* international law which is binding on two or a few states only.\(^4\) *General* international law is that which is binding upon a great many states. General international law, such as provisions of certain treaties which are widely, but not universally, binding and which establish rules appropriate for universal application, has a tendency to become universal international law.\(^5\)

One can also distinguish between those rules of international law which, even (p. 5) though they may be of universal application, do not in any particular situation give rise to rights and obligations *erga omnes*, and those which do. Thus, although all states are under certain obligations as regards the treatment of aliens, those obligations (generally speaking) can only be invoked by the state whose nationality the alien possesses: on the other hand, obligations deriving from the outlawing of acts of aggression, and of genocide, and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are such that all states have an interest in the protection of the rights involved.\(^6\) Rights and obligations *erga omnes* may even be created by the actions of a limited number of states.\(^7\) There is, however, no agreed enumeration of rights and obligations *erga omnes*, and the law in this area is still developing, as it is in the connected matter of a state’s ability, by analogy with the *actio popularis* (or *actio communis*) known to some national legal systems, to institute proceedings to vindicate an interest as a member of the international community as distinct from an interest vested more particularly in itself. The International Court of Justice has held that proceedings in defence of legal rights or interests require those rights or interests to be clearly vested in those who claim them (even though they need not necessarily have a material or tangible object damage to which would directly harm the claimant state),\(^8\) and that the *actio popularis* ‘is not known to international law as it stands at present’.\(^9\) Although the notion of *actio popularis* is in some respects associated with that of rights and obligations *erga omnes*, the two are distinct and, to the extent that they are accepted, each may exist independently of the other.

International law is sometimes referred to as ‘public international law’ to (p. 6) distinguish it from private international law.\(^10\) Whereas the former governs the relations of states and other subjects of international law amongst themselves, the latter consists of the rules developed by states as part of their domestic law to resolve the problems which, in cases between private persons which involve a foreign element, arise over whether the court has jurisdiction and over the choice of the applicable law:\(^11\) in other terms, public international law arises from the juxtaposition of states, private international law from the juxtaposition of legal (p. 7) systems. 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.\(^12\) 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 to another party.\(^13\) 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 aliens or the extent of the state’s jurisdiction.

§ 2 Ius cogens

States may, by and within the limits of agreement between themselves, vary or even dispense altogether with most rules of international law. There are, however, a few rules from which no derogation is permissible. The latter — rules of *ius cogens*, or peremptory norms of general international law — have been defined in Article 53 of the Vienna Convention on the Law of Treaties 1969 (and for the purpose of that Convention) as norms ‘accepted and recognised 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’; and Article 64 contemplates the emergence of new rules of *ius cogens* in the future.

Such a category of rules of *ius cogens* is a comparatively recent development and there is no general agreement as to which rules have this character. The International Law Commission regarded the law of the Charter concerning the prohibition of the use of force as a conspicuous example of such a rule. Although the Commission refrained from giving in its draft Articles on the Law of Treaties any examples of rules of *ius cogens*, it did record that in this context mention had additionally been made of the prohibition of criminal acts under international law, and of acts such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate; the observance of human rights, the equality of states and the principle of self-determination. The full content of the category of *ius cogens* remains to be worked out in the practice of states and in the jurisprudence of international tribunals. In this connection it is important that Article 66 of the Vienna Convention on the Law of Treaties provides for the judicial settlement of disputes concerning the application and interpretation of Articles 53 and 64.

The operation and effect of rules of *ius cogens* in areas other than that of treaties are similarly unclear. Presumably no act done contrary to such a rule can be legitimated by means of consent, acquiescence or recognition; nor is a protest necessary to preserve rights affected by such an act; nor can such an act be justified as a reprisal against a prior illegal act; nor can a rule of customary international law which conflicts with a rule of *ius cogens* continue to exist or subsequently be created (unless it has the character of *ius cogens*, a possibility which raises questions — to which no firm answer can yet be given — of the relationship between rules of *ius cogens*, and of the legitimacy of an act done in reliance on one rule of *ius cogens* but resulting in a violation of another such rule).

§ 3 Legal force of international law

Almost from the beginning of the science of international law the question has been discussed whether it is law properly so-called. Hobbes and Pufendorf had already answered the question in the negative. During the 19th century Austin and his followers took up the same attitude. In large measure the problem is one of definition, and different definitions of what constitutes ‘law’ can produce different answers to the question whether any particular body of rules may properly be regarded as ‘law’. Definitions drawn up primarily in terms of the internal (or municipal) law of states may be unnecessarily restrictive when applied to rules obtaining in other kinds of community. Although the characteristics of municipal law provide a valid standard against which to measure the quality as law of the rules in some other, and particularly the international, community, a body of rules may be law in the strict sense of the term even though it may not at some stages of its development possess all the characteristics of municipal law. Divergence from
the usual characteristics of municipal law has nevertheless often been regarded as expressive of the weakness of a body of rules *qua* law.\(^6\)

In earlier editions of this treatise\(^7\) law was defined as a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.\(^8\) The three requirements of this definition are satisfied by international law, to a greater or lesser extent. The states of the world do together constitute a body bound together through common interests which create extensive intercourse between them, and differences in culture, economic structure, or political system, do not affect as such the existence of an international community as one of the basic factors of international law.\(^9\) Rules for the (p. 10) conduct of the members of that community exist, and have existed for hundreds of years. Equally, there exists a common consent of the community of states that the rules of international conduct shall be enforced by external power, although in the absence of a central authority for this purpose states have sometimes to take the law into their own hands by such means as self-help\(^10\) and intervention\(^11\) — although the outlawing of resort to force, and the hesitant steps being taken towards international enforcement action, may indicate less reliance on self-help as the normal means for the enforcement of international law. The Security Council’s primary\(^12\) responsibility for and powers in relation to the maintenance of international peace and security, which extend to enforcement action including mandatory measures of various kinds, or the establishment of peacekeeping forces operating with the consent of the state in which the force exercises its functions, offer possibilities of future development towards an effective system of sanctions.\(^13\) They also serve to demonstrate that enforcement of the (p. 11) law through an agency which is both external to the state in default and representative of the international community has the authority of a recognised principle of international law. All the same, it must be recognised that deficiencies in the means at present available for the enforcement of international law including in particular the absence of truly compulsory arrangements for the judicial settlement of disputes\(^14\) — make it, by comparison with municipal law and the means available for its enforcement, certainly the weaker of the two in that respect.

While some deficiencies in international law make it as yet undeniably an imperfect legal order, developments over the past half century in particular indicate considerable progress towards their amelioration. An emerging system of sanctions for the enforcement of international law is discernible,\(^15\) while recourse to so-called law-making treaties,\(^16\) and certain aspects of the activities of international organisations,\(^17\) may be pointers in the direction of an emergent (p. 12) legislative process or at least an international analogue thereof.\(^18\) There are also certain other indications of a growing maturity in the international legal order. These include the recognition that certain rules have the character of *ius cogens*, which reduces the area for the operation of purely consensual rules,\(^19\) and establishes that within the general body of rules of international law there exists superior legal rules, with which rules of a ‘lower’ order must be compatible. Article 103 of the United Nations Charter may also be regarded as establishing, for members of the United Nations at least, the ‘superior’ nature of the obligations under the Charter.\(^20\)

There is similarly increasing acceptance that the rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states’ rights which, in the absence of a rule of law to the contrary, are unlimited.\(^21\) Although there are extensive areas in which international law accords to states a large degree of freedom of action (for example, in matters of domestic jurisdiction), it is important that that freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community.\(^22\) In the *Military and Paramilitary Activities* case the International
Court of Justice upheld the essential justiciability of even those disputes raising issues of the use of force and collective self-defence.\textsuperscript{23} Furthermore international law may now properly be regarded as a complete system.\textsuperscript{24} By this is meant not that there is always a clear and specific legal rule (p. 13) readily applicable to every international situation, but that every international situation is capable of being determined \textit{as a matter of law},\textsuperscript{25} either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles. It is thus not permissible for an international tribunal to pronounce \textit{a non liquet},\textsuperscript{26} i.e. to invoke the absence of clear legal rules applicable to a dispute as a reason for declining to give judgment (unless the \textit{compromis} submitting the dispute to the tribunal in some way limits the power of the tribunal to apply international law as a whole). The International Court takes judicial notice of international law.\textsuperscript{27}

\textbf{§ 4 Practice and the legal nature of international law}

Theoretical arguments about the legal nature of international law, insofar as some of them seek to deny the legally binding character of international law, take on an increasingly unrealistic appearance, since in practice international law is constantly recognised as law by the governments of states who regard their freedom of action as legally constrained by international law.\textsuperscript{1} States not only recognise the rules of international law as legally binding in innumerable treaties, but affirm constantly the fact that there is a law between themselves.\textsuperscript{2} They further recognise this law by requiring their officials, courts, and nationals, to act conformably with the duties imposed upon the state by international law. The legal character of international law is acknowledged in the 1970 Declaration on Principles of International Law (p. 14) concerning Friendly Relations and Cooperation among States;\textsuperscript{3} the seventh Principle includes the duty of every state to fulfil in good faith its obligations under the generally recognised principles and rules of international law.

\textbf{§ 5 The basis of international law}

It is not possible to say why international law as a whole is binding upon the international community without entering the realm of non-legal considerations. It is, however, in accord with practical realities to see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law — international law — to govern their conduct as members of that community. In this sense ‘common consent’ could be said to be the basis of international law as a legal system.\textsuperscript{1} That common consent is reinforced by there being an increasing number of matters (such as international civil aviation, the use of international rivers, and questions of pollution) for which some rules are a real necessity and which can only be satisfactorily regulated by internationally valid rules.

This ‘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, whilst dissent from a particular rule is not to be taken as withdrawal of consent to the system as a whole.

The common consent that is meant is thus not consent to particular rules but to the express or tacit consent of states to the body of rules comprising international law as a whole at any particular time. Membership of the international community carries with it the duty to submit to the existing body of such rules, and the right to contribute to their modification or development in accordance with the prevailing rules for such processes. Thus new states which come into existence and are admitted into the international community thereupon
become subject to the body of rules for international conduct in force at the time of their admittance. No single state can say on its admittance into the community of nations that it desires to be subjected to such and such rules of international law, and not to others. The admittance includes the duty to submit to all the rules in force, with the sole exception of those which are binding upon such states only as are parties to a treaty creating the rules concerned.

Similarly, no state can at some time or another declare that it will in future no longer submit to a certain recognised rule of international law. The body of the rules of this law can be altered by the generally agreed procedures only, not by a unilateral declaration on the part of one state. This applies to all rules other than those created by treaties which admit of denunciation or withdrawal.

Different from the duty to submit to existing rules, however, is the liberty of all states within the international community — newly admitted as well as old-established — to contribute to the evolution of those rules. In this way, while a single state’s withdrawal of consent to a putative new rule will not in itself affect the legal character of the rule, it may over a period and taken together with a similar attitude on the part of other states lead to a change in the law. Many states which have achieved independence, particularly in the last quarter of a century, have questioned the extent to which certain parts of the hitherto accepted body of customary rules are properly to be regarded as true rules of a universal international law: the influence of these states on the evolution of international law is likely to be significant. They have for example made a notable contribution to the demand for a codification of the principles of friendly relations and cooperation among states, and for the establishment of a new international economic order, and their new-found (or reacquired) independence has produced an emphasis on the sovereignty of states which is affecting many aspects of international law. The emergence of ‘consensus’ as an appropriate procedure for the adoption of many decisions at international conferences and in such bodies as the United Nations General Assembly has mitigated the consequences which would otherwise flow from rigid requirements of consent in an international community now numbering over 150 states, and has permitted the continued development of international law in accordance with the general consent of the international community.

§ 6 States as the normal subjects of international law

States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being, such as an alien or an ambassador. Rights which might necessarily have to be granted to an individual human being according to international law are not, as a rule, international rights, but rights granted by a state’s internal law in accordance with a duty imposed upon the state concerned by international law. Likewise, duties which might necessarily have to be imposed upon individual human beings according to international law are, on the traditional view, not international duties, but duties imposed by a state’s internal law in accordance with a right granted to, or a duty imposed upon, the state concerned by international law.

§ 7 Persons other than states as subjects of international law

States are primarily, but not exclusively, the subjects of international law. To the extent that bodies other than states directly possess some rights, powers and duties in international law they can be regarded as subjects of international law, possessing...
international personality. It is a matter for inquiry in each case whether — and if so, what —
rights, powers and duties in international law are conferred upon any particular body.

States may treat individuals and other persons as endowed directly with international rights
and duties and constitute them to that extent subjects of international law. 2 Although
individuals cannot appear as parties before the (p. 17) International Court of Justice, 3 states
may confer upon them the right of direct access to international tribunals. 4 As the
Permanent Court of International Justice recognised in the Advisory Opinion concerning the
Jurisdiction of the Courts of Danzig, states may expressly grant to individuals direct rights
by treaty; such rights may validly exist and be enforceable without having been previously
incorporated in municipal law. 5

A notable example of the direct applicability to individuals of the provisions of a treaty is
afforded by the operation of the European Economic Community. 6 Many treaty provisions
regarding human rights and fundamental freedoms also apply directly to individuals, who
may in certain circumstances institute proceedings before an international tribunal to
secure the observation to such rights, even as against the state of which they are
nationals. 7 Moreover, it is an established principle of customary international law that
individual members of armed forces of the belligerents — as well as individuals generally —
are directly subject to the law of war and may be punished for violating its rules. 8 Similarly,
offences against the peace and security of mankind are offences for which the responsible
individuals are punishable. 9 The doctrine adopted in many municipal systems to the effect
that international law is part of the law of the land is upon analysis yet another factor
showing that international law may act per se upon individuals, who become, to that extent,
subjects of international law. 10 Finally, even in respect of those rules of international law
which regulate the conduct of states we must not forget that the conduct actually regulated
is the conduct of human beings acting as the organ of the state. As Westlake said, ‘The
duties and rights of States are only the duties and rights of the men who compose them.’ 11

Not only individuals but also certain territorial or political units other than states may, to a
limited extent, be directly the subject of rights and duties under international law. This
applies, for example, to the rights and duties of political communities recognised as
belligerents and insurgents. 12 Prior to 1929 the Holy See, though not at that time a state,
was a subject of international rights and duties. 13 It must also be noted that international
practice has gradually recognised a measure of international legal personality of territorial
units which are (p. 18) not states but which nevertheless have been admitted to
participation in their own name in important international organisations of states such as
the Universal Postal Union and the World Health Organisation. 14

The possibility that inter-governmental organisations may possess international legal
personality is now accepted. 15 In the case concerning Reparation for Injuries Suffered in
the Service of the United Nations the International Court of Justice expressly rejected the
view that only states can be subjects of international law. In affirming the international
personality of the United Nations 16 as being indispensable for the fulfilment of the purpose
for which it was created, the Court pointed out that ‘throughout its history the development
of international law has been influenced by the requirements of international life’ and that
‘the progressive increase in the collective activities of States has already given rise to
instances of action upon the international plane by certain entities which are not States’. 17
Such new subjects of international law, the Court explained, need not necessarily be states
or possess the rights and obligations of statehood. For ‘the subjects of law in any legal
system are not necessarily identical in their nature or in the extent of their rights, and their
nature depends upon the needs of the community’. 18 Furthermore, as the International
Court stated in a later (p. 19) case, 19 an international organisation is not to be considered
as some form of super-state: ‘International organisations are subjects of international law
and, as such, are bound by any obligations incumbent upon them under general rules of
international law, under their constitutions or under international agreements to which they are parties’.

The constitutions of many international organisations contain an express provision intended to establish for the organisation a legal personality in international law separate from that of the member states. The constitution of an organisation often also confers on it specific international capacities which necessarily imply a measure of international personality. Furthermore, the states setting up an organisation may confer upon it functions which for their fulfilment necessitate the possession of certain international legal capacities and thus, to that extent, of international personality. Whether, and to what extent, an organisation possesses international personality distinct from that of the states members of it, is a question to be answered in the light of its particular circumstances.

The international personality of international organisations is manifest in various areas of international law, such as the law of treaties, international claims, privileges and immunities, and maritime flags. Although international organisations may not be a party in cases before the International Court of Justice, certain of them are entitled to seek advisory opinions from the Court.

Of particular interest is the development of the international personality of the European Communities. They, like many international organisations, have an international personality distinct from that of the member states. The extent of that personality is, however, not just a matter of having certain necessary powers and capacities alongside the full range of international powers and capacities still possessed by the member states, but extends also to matters for which the Community has acquired competence through action within the Community and for which the member states have accordingly, by Community law, ceased to have international competence, having in effect transferred their powers in relation to those matters to the Community.

Some organisations, though international in scope and organisation, are not composed of states or governments and operate under private law rather than international law. Such non-governmental organisations (often referred to as NGOs) vary greatly in their significance and standing. Some have been accorded certain very limited rights on the international plane, such as the right to attend as observers meetings of inter-governmental organisations or international conferences. Under Article 71 of the United Nations Charter the Economic and Social Council may ‘make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence’. A European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations was concluded on 24 April 1986.

The difficulty of drawing sharp lines between different categories of organisations is illustrated by a further intermediate class between inter-governmental organisations and purely private international organisations. This comprises companies and consortia which, while their structure is essentially that of private law organisations, are partly or wholly composed of governmental agencies: they may also, to a limited degree, have conferred on them certain attributes of international personality.

**Footnotes:**

1 In contradistinction to mere usages (i.e. practices which, although perhaps widely adopted, are not adopted with any sense of their being legally binding), to morality (see §17), and sometimes to international comity (see §17).

2 See §7.

4 See § 23 as to the scope of the application of the rules of international law.

5 See § 583, n 3. See Rie, Grotius Society, 36 (1950), pp 209–28, as to the Congress of Vienna and the origins of ‘public law of Europe’.


Similar questions may arise in relation to some general multilateral treaties, where any party may in some circumstances claim to be injured by a breach of the treaty by any other party, even if that breach does not directly affect the claimant party’s own (including its nationals’) material interests. See §§ 150, at n 17, and 436, n 12, as to human rights treaties. See generally on responsibility arising out of breaches of multilateral treaties, Sachariew, Neth IL Rev, 35 (1988), pp 273–89.

7 Reparations for Injuries Case, ICJ Rep (1949), p 185; Namibia Case, ICJ Rep (1971), p 56. See also §§ 626–7, as to the extent to which states may by treaty (such as the UN Charter) give rise to obligations applicable also to third states. And see § 583, n 8.

8 South West Africa Cases (Ethiopia and Liberia v South Africa) (Second Phase), ICJ Rep (1966), at pp 32–3.

9 ibid, p 47. See also the Dissenting Opinion of Judge De Castro in the Nuclear Tests Case, ICJ Rep (1974), pp 386–7; and Ireland v United Kingdom (1978), ILR, 58, pp 190, 291–2. See generally Schwelb, Israel YB on Human Rights, 2 (1972), pp 46–56; Fitzmaurice, Annuaire: Livre du Centenaire (1973), p 326; Jenks in Ius et Societas (ed Wilner, 1979), pp 151–8; Brownlie, Principles of Public International Law (4th ed, 1990), pp 466–73; Gray, Judicial Remedies in International Law (1987), pp 211–15; Thirlway, BY, 60 (1989), pp 92–102. See also n 6 and § 157 (as to the possibility that state conduct which is categorised as criminal may justify countermeasures by any other state). See also Klass Case (1978), ILR, 58, pp 423, 443, allowing proceedings for breach of the European Convention on Human Rights even though a law had not been implemented against the applicant, so long as he was directly affected by its existence; see also Aumeeruddy-Cziffra v Mauritius (1981), ILR, 62, pp 285, 293.


For a survey of the decisions of the PCIJ on questions of private international law see Hammarskjöld, Revue critique du droit international, 30 (1934), pp 315–44. As to conflict of laws before international tribunals see Lipstein, Grotius Society, 27 (1941), pp 141–81, and 29 (1943), pp 51–84; Hambro, loc cit in Hag R, above.


11 To be distinguished from rules of private international law are those agreements reached between the states having as their aim the unification of certain substantive rules of their respective internal legal systems, eg as to trade marks, bills of exchange and carriage of goods and persons by air; these agreements may often include provisions dealing with private international law as well as with unification of private law. Leading examples in this field are the Brussels Convention of 1924 relating to the Carriage of Goods by Sea (amended by the Brussels Protocol of 1968, and again at Hamburg in 1978), widely known as ‘The Hague Rules’ because they were originally drafted in that city; the Warsaw Convention of 1929 on Carriage by Air and the Berne Copyright Convention 1886 (both subsequently amended several times); and various Conventions relating to the international sale of goods concluded at The Hague in 1964, New York in 1974 and Vienna in 1980. Note also the steps taken by the European Economic Community in the matter of harmonisation of laws, especially by means of Directives under Art 100 of the Treaty establishing the EEC; and also various conventions concluded within the Council of Europe.

of the various States: see on this aspect of the Warsaw Convention 1929, Mankiewicz, ICLQ, 21 (1972), pp 718-57.

Note also that many multilateral treaties, eg in the field of human rights, are intended to standardise the treatment accorded within the states parties to them, and to that extent involve a measure of unification or harmonisation of law.

12 See the Serbian Loans Case, PCIJ, Series A, No 14, at p 41. Several treaties have been concluded at various Hague Conferences since 1902, the conferences themselves having begun in 1893. The value of these conferences led to their being established on a permanent basis by a statute drawn up in 1951 (TS No 65 (1955)). See Review of the Multilateral Treaty-Making Process (UN Legislative Series, ST/LEG/SERIES B/21 (1985)), pp 513–21; van Loon, in The Effect of Treaties in Domestic Law (eds Jacobs and Roberts, 1987), pp 221–51. Other major treaties on private international law include the 1928 Bustamante Code (LNTS, 86, p 111), now binding on a number of Central and South American states; conventions signed in Geneva in 1923 and 1928, and in New York in 1958, concerning arbitration awards; conventions signed in Geneva in 1930 and 1931 concerning bills of exchange and cheques; conventions signed in Brussels in 1968 by members of the European Economic Community on the mutual recognition of judgments and of companies (see § 143, n 5); and conventions on a number of subjects concluded at Inter-American Specialised Conferences on Private International Law held in 1975, 1979, 1985 and 1989 (ILM, 14 (1975), p 325, ibid, 18 (1979), p 1211, ibid, 24 (1985), p 459 and ibid, 29 (1990), p 62). See generally Kosters and Bellemans, Les Conventions de la Haye sur le droit international privé (1921); Nolde, Hag R, 55 (1936), i, pp 303–427; Plaisant, Les Règles de conflit de lois dans les traités (1946); Jenks, The Common Law of Mankind (1958), pp 51–4; van Hoogstraten, Hag R, 122 (1967), iii, pp 343–424.

13 See the Guardianship of Infants Case ICJ Rep (1958), p 55.

14 See § 407.

15 See § 136ff.

1 See § 642, n 2.


4 YBILC (1966), ii, pp 247–9; and as to slavery see also commentary on Art 61. The ILC subsequently considered that it was among the four areas which it had identified as giving rise to an international crime (see § 157, n 5) ‘that are to be found the rules which the contemporary international legal order has elevated to the rank of ius cogens’: YBILC, 1976, vol II, pt 2, p 121 (para 67).


1 De Cive, xiv, 4.

2 De Jure Naturae et Gentium, ii, c iii, § 22.

3 Lectures on Jurisprudence, vi.

4 On the legal nature of international law see Hart, The Concept of Law (1961), ch X; H Lauterpacht, Collected Papers, (vol 1, 1970), pp 11–36. The matter is also discussed in many of the works cited in n 9.

5 The term ‘municipal law’ is often used in the sense of national or state law in contradistinction to international law. Municipium was ‘a town, particularly in Italy, which possessed the right of Roman citizenship ... but was governed by its own laws’: Lewis and Short, Latin Dictionary.


7 8th ed, § 5; see also ibid, §§ 6–9.

8 That is, external to the person against whom they are enforced.

9 The preamble to the Draft Declaration on Rights and Duties of States, adopted by the General Assembly of the UN in 1949 (Res 375 (IV)), affirms that ‘the States of the world form a community governed by international law’.


10 See § 129(3).

11 See § 128.


Note also the development in recent years of the criminal responsibility of individuals for certain acts contrary to international law: see §§ 148, 435, and vol II of this work (7th ed), § 52b.

On the enforcement of international judicial decisions see Art 94 of the UN Charter; Jenks, The Prospect of International Adjudication (1964), pp 663–726; Anand, Studies in

14 Thus compulsory disputes settlement provisions in some treaties depend on the consent of states expressed by their becoming parties to the treaty. The ‘compulsory’ jurisdiction of the ICJ, under Art 36.2 of its Statute, depends on voluntary declarations in advance by the States concerned. On this so-called ‘optional clause’ see vol II of this work (7th ed), pp 58–65 and Jenks, The Prospects of International Adjudication (1964), pp 547–603; Merrills, BY, 50 (1979), pp 87–116.


15 See n 13. See also § 145ff, as to the law of state responsibility, which allows for the redress of international wrongs suffered by one state at the hands of another. See also generally, Fisher, Improving Compliance with International Law (1981).

16 See § 11, n 9, and § 583.

17 See § 16.

18 As to which see also § 32.

19 Note also ‘general principles of law’ as a source of international law less dependent upon consent than other sources: see § 12.

20 See § 592.

21 See Fitzmaurice, BY, 3 (1953), pp 8–18, and Hag R, 92 (1957), ii, pp 49–59; H Lauterpacht, The Development of International Law by the International Court (1958), pp 359–67; Waldock, Hag R, 106 (1962), ii, pp 161–9. The older view found some support in the dictum of the PCIJ in the Lotus case that ‘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 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.’ (PCIJ, Series A, No 10, p 18.) Although the Court was directed by the compromis to consider the matter from the
standpoint of seeking rules prohibiting Turkey from doing what she had done, the Court explained that this ‘way of stating the question is also dictated by the very nature and existing conditions of international law’ (ibid).

22 Thus the notion of ‘abuse of right’ is unavailable unless, but is available where, it is a ‘right’ which is being exercised.

23 ICJ Rep (1986), pp 26, 27. The Court has also noted that while it may be aware that political aspects may be present in any legal dispute brought before it, the purpose of recourse to the Court is the peaceful settlement of legal disputes; its judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a state at a particular time, or in particular circumstances, to choose judicial settlement (Border and Transborder Armed Actions, ICJ Rep (1988), p 91).


25 Thus although in the Barcelona Traction case (Second Phase) the ICJ, noted that ‘International law may not, in some fields, provide specific rules in particular cases’, it nevertheless proceeded to decide the case before it, arising in one of those fields, as a matter of law (ICJ Rep (1970), p 38). See also Oil Fields of Texas Inc v Iran (1982), ILR, 69, at pp 581 and 594: ‘[the] circumstances do not fall clearly within well developed and discussed doctrines of law. The controlling rules have therefore to be derived from principles of international law applicable in analogous circumstances or from general principles of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered’ (p 581).

26 Article 12 of the ILC Draft Articles on Arbitral Procedure provides that ‘the tribunal may not bring in a finding of non liquet on the ground of the silence or obscurity of the law to be applied’ (YBILC, (1958), ii, p 8). In Desgranges v ILO the impermissibility for a judicial tribunal to pronounce a non liquet because of the silence or obscurity of the law was regarded as a ‘fundamental tenet of all legal systems’: ILR, 20 (1953), pp 523, 530.


2 It is not inconsistent with this affirmation that states may differ as to precisely what rules that law prescribes.
See § 105. Note also the terms of the Draft Declaration on Rights and Duties of States cited at §3, n 9.


For a bibliography of earlier discussion of the subject see 8th ed of this vol, p 15, n 1.

It may be noted that in Marxist theory in particular the requirement of consent, as a reflection of state sovereignty, is given notably strong emphasis: see §§ 23, n 22, and 104, n 5; and § 104, n 6 as to ‘peaceful coexistence’.

2 See Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 237–45. The matter is also discussed in many of the works cited in n 3. In relation to treaties a new state can exercise a degree of choice (which may be substantial) as to which treaties formerly extending to its territory it will regard as continuing to bind it after independence: see generally § 66.


It may be that the tendency of some newly independent states to question rules of customary international law on the basis that they reflect concepts which are essentially alien to their cultures, attitudes and interests no longer represents a major element in their approach to international law. Those states increasingly seem to accept, eg in pleadings before the ICJ, international law as the appropriate general frame of reference for the discussion of international legal issues (while, of course, remaining free — as are all states — to contend for the existence of particular rules in a form which reflects their requirements).

4 See § 105.

5 See § 106.

6 It must be remembered that many ‘new’ states in fact have a long history as one-time independent political societies.

7 See § 575, n 13.

As to when a community constitutes a state see generally § 34; see also § 40 (recognition of states). As to the international personality of states, and certain other entities, see § 103.

2 See the *Mavrommatis Palestine Concessions Case* (1924), PCIJ, Series A, No 2, p 12, line 10.
The question whether there could be any subjects of international law other than states was at one time a matter of strenuous debate. In the first three editions of this work the view was expressed that states only and exclusively are the subjects of international law. It is now generally accepted that there are subjects other than states, and practice amply proves this. One of the most important pioneers in getting this ‘modern’ view accepted was Sir Hersch Lauterpacht, the editor of the 8th ed of this vol. See H Lauterpacht, LQR, 63 (1947), pp 438–60, 64 (1948), pp 97–119, and Collected Papers, I (1970), pp 136–50. See also n 2 on p 19 of the 8th ed of this vol for an extensive bibliography of the earlier discussion.

See generally § 375. In Globocnik-Vojka v Republic of Austria ILR, 71 (1958), p 265, liquidators of a bank, appointed under a treaty provision pursuant to which the bank was put into liquidation, were held to have acquired a ‘status of persons under international law’.

Article 34 of the Statute of the ICJ provides as follows: ‘Only States may be parties in cases before the Court’. See vol II of this treatise (7th ed), § 25a.

While admitting that in principle a treaty ‘cannot, as such, create direct rights and obligations for private individuals’, the Court said: ‘It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts’: (1928) PCIJ, Series B, No 15, p 17. See for comment thereon H Lauterpacht, The Development of International Law by the International Court (1958), pp 173–6.

See § 19, sect (3).

See § 431ff. See also § 399 as to refugees.

See § 148.

See §§ 148, n 8, and 435.

See § 19.

Collected Papers, p 78.

See § 49; and note particularly § 49, n 4 as to so-called ‘national liberation movements’.

See § 99ff.

See § 84, n 17. See also § 85, n 29, as to the concept of ‘peoples’. As to the position of dependent territories in general see § 84; and see § 75 on the international position of the member states of a federation; and also § 22, n 7 as to the position of certain native tribes.


16 In addition to certain rights and capacities to be enjoyed by the UN within the domestic legal systems of states and the right to present international claims as affirmed in the Reparations case, the UN’s international personality finds expression in its general possession of ‘juridical personality’ (Art 1 of the Convention on Privileges and Immunities of the United Nations 1946: that personality is not limited to matters of private law), the capacity to conclude international agreements with states — including non-member states — and other international organisations, and the power to exercise direct jurisdictional and legislative powers (see Art 81 of the Charter; and note also certain powers vested in the UN under the Treaty of Peace with Italy 1947 in relation to Trieste (§ 96, n 5)); certain powers in relation to West New Guinea (West Irian) under GA Res 1752 (XVII) (1962), UNYB (1962), pp 124–7; and the powers of the UN Council for Namibia (§ 88, n 20).


18 *Ibid.* As international personality is not limited to states, the latter are bound to fulfil international duties — ie duties prescribed by general international law — not only in relation to other states but, in proper cases, to international persons generally. This explains why in the Reparation for Injuries case the ICJ held that the UN was entitled to bring a claim also against a non-member state although in the same case the Court held that the basis of the claim by the UN is a breach of a duty due to it. For, once the Court found that the UN was endowed by the Charter with international personality not only in relation to its members but *erga omnes* (*ibid*, p 185), it followed that all states — whether members of the UN or not — owed it duties as prescribed by general international law. *Sed quaere.* See Fitzmaurice, *BY*, 29 (1952), p 21. Note also the observations of the Federal German Constitutional Court on the non-statal character of the European Community: *Application of Frau Klopenburg* [1988] 3 CMLR 1, 18.

While the Court has thus held the UN vested with certain attributes of international personality *erga omnes*, there is a question whether such a conclusion should also follow in relation to an organisation of a less primary and universal character, and thus whether non-members of such a more limited organisation are under any obligation to recognise its international personality.


20 It is legitimate to deduce from the unanimous finding of the Court in the Reparation for Injuries case that international personality is a necessary attribute of any public international organisation which possesses a personality distinct from its members and whose rights and duties, in the light of its constitution and practice, are such that they cannot be effective without the attribution of international personality to the organisation in question: ICJ Rep (1949), pp 178, 180.

21 The question was much discussed in the context of the question whether the member states of the International Tin Council were liable for the debts of the Council, which question was answered in the negative by the English courts, on the ground that in English law (by virtue of an Order in Council and not by virtue directly of the relevant treaty provision) the Council had a separate legal capacity to conclude contracts and that therefore only the Council, and not its member states, could be held liable on its contracts: *Machine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523 (House

See also, as to the recognition in English law of the legal personality of an international entity of which the UK was not a member and which was not established in the UK, but which was created a corporate body in a foreign state recognised by the UK, *Arab Monetary Fund v Hashim (No 3)* [1991] 2 WLR 729; and, generally on this point, UKMIL, BY, 49 (1978), pp 346–8; Seidl-Hohenveldern, *Corporations in and under International Law* (1987), pp 100–104. See also *Bumper Development Corp. v Commissioner of Police of the Metropolis*, The Times, 14 February 1991. These various cases leave open the question whether legal personality will be recognised in English law if it flows solely from customary international law (the position of a foreign state suggests that it might be recognised) or from incorporation under the laws of a territorial entity not recognised as a state (as to which see § 56, nn 27–32). As to the history of the personality of international organisations in English law, see Marston, ICLQ, 40 (1991), pp 403–24.

22 See § 596.

23 See § 145, n 2.

24 See § 465, n 2, and p 1071.

25 See § 289.

The first General Assembly approved the emblem of the UN for its official seal, and recommended that legislation should be passed by members to prevent its use for commercial purposes by means of trade marks or commercial labels as well as the use of the official seal and of the name of the UN, and of abbreviations of that name through the use of initial letters: Res 92 (I) (1946). See also UN Juridical YB (1965), p 221; *ibid* (1970), pp 168–9; *ibid* (1973), pp 136–8; *ibid* (1976), pp 176–7; and *ibid* (1977), pp 188–91. In Res 167 (II) (1947) the General Assembly adopted a UN flag, and pursuant to the Assembly’s request the Secretary-General later that year promulgated a Flag Code which provided: (a) that the flag of the UN shall not be subordinate to any other flag; (b) that it shall be flown from all buildings, offices and official residences designated as such by the UN; (c) that it shall be used by any unit acting on behalf of the UN such as the Military Staff Committee. See Fawcett, ILQ, 3 (1950), p 279. By a Resolution of the Security Council adopted in 1950 the forces operating in Korea were given the name and the flag of the UN. See Baxter, BY, 29 (1952), pp 332–7. The UN flag was also used by eg the UN Security Force in West New Guinea (West Irian) (see paragraph 7(b) of the Secretary-General’s General Directive, UN Juridical YB (1964), p 36), the UN force in the Congo (UNTS, 414, p 229, para 26), and the
UN force in Cyprus (ibid, 492, p 57, para 20). As to the use of the UN flag in trust territories see GA Res 325 (IV) (1949).

26 See Art 65 of the Statute of the ICJ, and Art 96.2 of the Charter of the UN. A list of the organs and agencies authorised to request advisory opinions is given in the annual vols of the YB of the ICJ.

27 The creation of the European Communities has thus involved, at a regional level, a notable concession of sovereign powers by member states and a degree of supranationality for the Communities. The transfer of sovereign powers from the member states to the Communities and the pooling of sovereignty involved in membership of the Communities are, however, limited by the ultimate possibility of withdrawal from the Communities: so long as that possibility remains, any transfer of powers from states to the organisations is in the last analysis essentially temporary. Furthermore, such transfer or pooling of sovereign powers as has taken place is limited to the fields, mainly economic, which are covered by the European Communities: they do not, accordingly, involve such matters as defence and foreign policy generally. For matters not falling within the scope of the Communities’ powers the member states have developed separate procedures of political cooperation, through which they cooperate outside the framework of the Community Treaties. See Report on European Political Cooperation, agreed by the Foreign Ministers of the European Communities on 13 October 1981 (Cmd 8424); and Art 30 (Title III) of the Single European Act 1986 (ECT No 12 (1986); ILM, 25 (1986), p 503). And see van der Meersch, Hag R, 148 (1975), v, pp 1–433; Charpentier, AFDI, 25 (1979), pp 753–78; Perrakis, AFDI, 34 (1988), pp 807–22; and Crotty v An Taoiseach [1987] 2 CMLR 666, on which see O’Connor, AFDI, 33 (1987), pp 762–73, and Lang, CML Rev, 24 (1987), pp 709–18.

The so-called ‘supranationality’ of the European Communities has been much discussed, particularly in the context of the direct applicability and supremacy of Community law, as to which see § 19, nn 81, 88–9, respectively. The development of its international competences has owed much to decisions of the European Court of Justice in the context of the respective treaty-making powers of the Communities and their member states. The European Court has held that the ‘Community constitutes a new legal order of international law’: van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.


29 See eg n 31.

30 See eg the Appendix to the Final Act of the Third UN Conference on the Law of the Sea 1982, listing non-governmental organisations among the observers participating in the Conference.

31 Such arrangements have been made pursuant to the Council’s Res 1296 (XLIV) (1968), superseding the criteria for consultative arrangements set out in Res 288B (X) (1950). By Res 3 (II) (1946) the Council established a Standing Committee on NGOs, with 19 members (Res 1981/50 (1981)) elected for a term of four years (Res 70 (ORG-75) (1975)). A list of NGOs in consultative status with the Council is to be found in the annual volumes of the UNYB, eg 36 (1982), pp 1243–51. Such NGOs may send observers to public meetings of the Council and its commissions, with certain rights to submit views in writing and in some cases orally. Representatives of NGOs attending meetings pursuant to these arrangements
are entitled to no privileges and immunities, although s 11 of the Headquarters Agreement with the USA provides for their freedom of access to the Headquarters district.

