## Contents

Pre	face	xiv
List	t of abbreviations	xvi
List	t of selected cases	xviii
1	International law: history, theory and purpose	1
1	international law. instory, theory and purpose	1
1.1	The approach to international law in this book	1
1.2	1	2 2
1.3	The place of international law in history	2
	1.3.1 The ancient roots of international law	4
	1.3.2 The Peace of Westphalia and the development of	
	modern international law	8
1.4	Theories of international law	10
	1.4.1 The framework for international law and the	
	importance of norms	10
	1.4.2 Different theoretical conceptions of international law	12
	1.4.2.1 Natural and positive law theories	12
	1.4.2.2 Relationship between international relations,	
	international law, and different theories of	
	international law	17
	1.4.2.2.1 Realism and liberalism	18
	1.4.2.2.1.1 Realism	18
	1.4.2.2.1.2 Liberalism	19
	1.4.2.2.1.3 Realism and liberalism as alternatives	20
	1.4.2.2.1.4 Constructivism	20
	1.4.2.2.2 Post-Cold War	21
	1.4.2.2.3 Marxist theory	22
	1.4.2.2.4 Critical legal studies	23
	1.4.2.2.5 Third World theory	25
	1.4.2.2.6 Feminist theory	26
1.5	Specialist areas of international law	27
	1.5.1 The international law of the sea	27
	1.5.2 International trade law	30
	1.5.3 International environmental law	31

	1.5.4 International humanitarian law	33
	1.5.5 International human rights law	34
	1.5.6 International criminal law	36
1.6	What is international law?	38
2	International law-making: the sources of international law	45
2.1	The source of obligation in international law	46
	2.1.1 Derivation of the sources of international law and the	
	question of hierarchy	46
	2.1.2 The consensual basis of international law	49
	2.1.3 The obligatory nature of international law	50
	2.1.4 Fragmentation: the relevance of normative	
	frameworks given the proliferation of sui generis areas	
	of international law	51
2.2		52
	2.2.1 International conventions: the law of treaties	53
	2.2.1.1 The Vienna Convention on the Law of Treaties and	
	its customary status	53
	2.2.1.2 Formation	54
	2.2.1.2.1 Intention to create international legal relations	54
	2.2.1.2.2 Consent to be bound	56
	2.2.1.2.3 Pacta sunt servanda and entry into force	58
	2.2.1.2.4 Objects of treaties – <i>jus cogens</i> and third states	59
	2.2.1.3 Amendment and modification	60
	2.2.1.4 Reservations	61
	2.2.1.5 Interpretation	63
	2.2.1.6 Invalidity	65
	2.2.1.7 Termination and suspension	67
	2.2.1.8 Some contemporary issues in treaty law	71
	2.2.1.8.1 Codification and progressive development of	
	international law: the role of multilateral treaties	71
	2.2.2 Customary international law	73
	2.2.2.1 The origins and dynamic nature of international	
	custom	73
	2.2.2.2 State practice: the first element of custom	75
	2.2.2.1 Consistency of state practice	75
	2.2.2.2 Kinds of state practice – acts, omissions and	
	acquiescence	77
	2.2.2.3 Quantity of state practice	79
	2.2.2.3 <i>Opinio juris</i> : the second element of custom	80
	2.2.2.3.1 General sources of evidence of <i>opinio juris</i>	80

Contents	
Contents	

	2.2.2.3.2 Treaty obligations as evidence of <i>opinio juris</i>	84
	2.2.2.3.3 UN General Assembly resolutions as evidence of	07
	opinio juris	86 89
	<ul><li>2.2.2.4 Challenges to the traditional elements of custom</li><li>2.2.2.5 Treatment by international courts and tribunals</li></ul>	89 91
	2.2.2.5 The persistent objector exception	91
	2.2.2.7 Jus cogens	93 95
	2.2.2.7 Jus cogens 2.2.2.8 Erga omnes obligations	101
	2.2.2.9 Regional custom	101
	2.2.3 General principles of law	102
	2.2.3 Central principles of law 2.2.3.1 The nature and role of general principles of law	105
	e 1 1	105
		108
	international courts and tribunals	108
	2.2.3.3 <i>Non liquet</i> in international law	109
	2.2.4 Judicial decisions and highly regarded publicists –	110
	subsidiary sources	110
	2.2.4.1 Judicial decisions	110
	2.2.4.1.1 No precedent in international law: Article 59 ICJ	110
	Statute	110
	2.2.4.1.2 A <i>de facto</i> normative system of precedent at	110
	international law?	112
• •	2.2.4.2 Writings of publicists	114
2.3	Conclusions	115
3	The relationship between international and national law	119
3.1	Different conceptions of the relationship between	
	international and national law	120
	3.1.1 Dualism	120
	3.1.2 Monism	121
	3.1.3 An alternative approach	122
3.2	National law in international law	123
	3.2.1 International law is supreme in its domain	123
	3.2.2 The application of national law within international	
	law	124
	3.2.3 Use of national law by international tribunals to	
	resolve disputes	125
	3.2.4 Use of national law to resolve a state's position on a	
	question of international law	129
3.3	International law in national law	132
3.4	Different approaches to the implementation of international	
	law in national law	136
		100

vii

3.4.3 Th int 3.4.3.1 ( 3.4.3.1.1	corporation ne implementation of customary international law to national law	137
int 3.4.3.1 ( 3.4.3.1.1		
3.4.3.1 3.4.3.1.1	to national law	
3.4.3.1.1		138
	Common law states	138
2 4 2 1 2	The United Kingdom	138
	The United States	141
3.4.3.1.3	Australia	143
3.4.3.2 (	Civil law states	144
3.4.3.2.1	Italy, Germany and Japan	144
		145
3.4.3.3	Contemporary developments: growing constitutional	
r	ecognition of the primacy of customary	
i	nternational law	145
3.4.4 Th	e implementation of treaty law into national law	146
3.4.4.1	Common law states	147
3.4.4.1.1	The United Kingdom	147
		148
		149
3.4.4.2	Civil law states	151
		151
		151
		151
		152
Conclusio	ns	153
he subjects	s of international law: states	155
	s of international law: states e of the personality of states in international law	155 157
	e of the personality of states in international law	
The natur Sovereign	e of the personality of states in international law	157
The natur Sovereign Tradition	e of the personality of states in international law ty	157 158
The natur Sovereign Traditiona 4.3.1 Fiz	e of the personality of states in international law ty al criteria for statehood	157 158 161
The natur Sovereign Traditiona 4.3.1 Fi 4.3.2 Se	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population	157 158 161 162
The natur Sovereign Traditiona 4.3.1 Fit 4.3.2 Se 4.3.3 Th	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population cond criterion: territory	157 158 161 162 163
The natur Sovereign Traditiona 4.3.1 Fi 4.3.2 Se 4.3.3 Th 4.3.4 Fo rel	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population cond criterion: territory hird criterion: government ourth criterion: capacity to enter into legal ations	157 158 161 162 163
The natur Sovereign Traditiona 4.3.1 Fi 4.3.2 Se 4.3.3 Th 4.3.4 Fo	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population cond criterion: territory hird criterion: government ourth criterion: capacity to enter into legal ations	157 158 161 162 163 165
The natur Sovereign Traditiona 4.3.1 Fit 4.3.2 Se 4.3.3 Th 4.3.4 For rel Recognition 4.4.1 Po	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population cond criterion: territory hird criterion: government purth criterion: capacity to enter into legal lations on	157 158 161 162 163 165 167
The natur Sovereign Traditiona 4.3.1 Fit 4.3.2 Se 4.3.3 Th 4.3.4 For rel Recognition 4.4.1 Poor 4.4.2 Dec	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population cond criterion: territory hird criterion: government ourth criterion: capacity to enter into legal ations on blitical recognition of statehood eclaratory and constitutive theories of recognition	157 158 161 162 163 165 167 168 169 172
The natur Sovereign Traditiona 4.3.1 Fit 4.3.2 Se 4.3.3 Th 4.3.4 For rel Recogniti 4.4.1 Pot 4.4.2 De 4.4.3 De	e of the personality of states in international law ty al criteria for statehood rst criterion: permanent population cond criterion: territory hird criterion: government purth criterion: capacity to enter into legal lations on	157 158 161 162 163 165 165 167 168 169
	3.4.3.2.1 3.4.3.2.2 3.4.3.3 3.4.3.3 3.4.4.1 3.4.4.1.1 3.4.4.1.2 3.4.4.1.3 3.4.4.1.2 3.4.4.1.3 3.4.4.2.1 3.4.4.2.1 3.4.4.2.2 3.4.4.2.3 3.4.4.2.3 3.4.4.3 (i)	<ul> <li>3.4.4.1 Common law states</li> <li>3.4.4.1.1 The United Kingdom</li> <li>3.4.4.1.2 The United States</li> <li>3.4.4.1.3 Australia</li> <li>3.4.4.2 Civil law states</li> <li>3.4.4.2.1 Germany</li> <li>3.4.4.2.2 Japan</li> <li>3.4.4.2.3 The Netherlands</li> </ul>

4.5	Contemporary developments and the role of other criteria in	
	the development of statehood	176
	4.5.1 Willingness to observe international law and	
	fundamental rights	176
4.6	The principle of territorial sovereignty	180
	4.6.1 Territory, title and sovereignty	181
	4.6.2 The role of territorial sovereignty	182
	4.6.3 Territory and the state	183
	4.6.4 The acquisition of territorial sovereignty	184
	4.6.5 The former modes of acquisition	185
	4.6.5.1 Accretion	185
	4.6.5.2 Cession	186
	4.6.5.3 Occupation	186
	4.6.5.4 Prescription	187
	4.6.5.5 Subjugation	188
	4.6.6 Departure from the traditional modes of acquisition –	100
	guiding principles	189
	4.6.6.1 Relativity of title	189
	4.6.6.2 Inter-temporal law and critical dates	190
	4.6.6.3 Continued and effective occupation and	170
	administration	191
	4.6.6.4 Changing values in the international community and	171
	the principle of stability	191
4.7	Scope of territorial sovereignty	192
4.8	Future directions in territorial sovereignty	192
4.9	Peoples and self-determination	194
ч.)	4.9.1 Development of the principle of self-determination	195
	4.9.1.1 Self-determination up to the Second World War	195
	4.9.1.2 The UN Charter and Resolutions	195
	4.9.2 Decolonization and <i>uti possidetis</i>	197
	1	200
	4.9.3 Recent developments	200
	4.9.4 Self-determination and recognition in the current climate	202
4 10		203
4.10	Conclusions	204
	Other subjects of international law: non-state actors and	207
Ir	nternational law's evolution	207
5 1	International organizations	209
5.1	International organizations 5.1.1 The United Nations	
		211
	5.1.1.1 Organs and functions of the United Nations	211
	5.1.1.1.1 The General Assembly	213

Contents

ix

	5.1.1.1.2 The Security Council	213
	5.1.1.1.3 The Economic and Social Council	216
	5.1.1.1.4 The Trusteeship Council	217
	5.1.1.1.5 The International Court of Justice	217
	5.1.1.1.6 The Secretariat	219
	5.1.1.2 International personality of the United Nations	220
5.2	Non-governmental organizations: the growing place of civil	
	society in international law	225
5.3	Individuals: the rupture of state-centric international	
	law?	229
	5.3.1 International duties of individuals	230
	5.3.1.1 Individual criminal responsibility	231
	5.3.2 International rights of individuals	234
	5.3.2.1 Human rights	235
5.4	Corporations	237
5.5	Some other non-state actors	241
5.6	Conclusions	242
6.	Jurisdiction privileges and immunities	244
6.1	Types of jurisdiction: prescription and enforcement	246
	6.1.1 Prescriptive jurisdiction	246
	6.1.2 Enforcement jurisdiction	247
6.2	Civil and criminal jurisdiction	248
6.3	Bases of jurisdiction	250
	6.3.1 Territorial principle	251
	6.3.1.1 The effects doctrine	254
	6.3.2 Nationality principle	255
	6.3.3 Protective principle	256
	6.3.4 Passive personality principle	257
	6.3.5 Universal jurisdiction	258
	6.3.5.1 Crimes at customary international law	259
	6.3.5.2 Treaties providing for 'universal jurisdiction': <i>aut</i>	
	dedere aut judicare	262
	6.3.5.3 True universal jurisdiction	263
	6.3.5.4 Illegal apprehension of accused	265
	6.3.6 The Alien Tort Claims Statute	266
6.4	Extradition	266
6.5	Immunity from jurisdiction	268
	6.5.1 Origins: the doctrine of absolute sovereign immunity	268
	6.5.2 The restrictive or qualified sovereign immunity	
	doctrine	270

	6.5.3	The nature test	271
	6.5.4	Functional immunity	272
	6.5.4.1	The scope of functional immunity	273
	6.5.4.2	Personal status immunity	275
	6.5.4.2	2.1 Diplomatic and consular immunity	276
6.6	Conclu	usions	278
7 5	State res	sponsibility	280
7.1		C Articles and the changing discourse of state	
		sibility	281
	7.1.1	The long road to codification	281
	7.1.2	Significance of the Articles	282
7.2		ationally wrongful acts	283
7.3		les of attribution	284
		State organs	284
		Governmental authority	285
		Instructions, direction or control	287
	7.3.4	Adoption and insurrection movements	289
	7.3.5	Derived responsibility	290
	7.3.6	Lex specialis	291
7.4	Circun	nstances precluding wrongfulness	292
	7.4.1	Consent	292
		Self-defence	293
	7.4.3	Force majeure	293
	7.4.4	Distress	294
	7.4.5	Necessity	294
7.5	Conse	quences of breach	296
	7.5.1	Cessation	296
	7.5.2	Assurances and guarantees of non-repetition	297
	7.5.3	Reparations	297
		Restitution	299
	7.5.5	Compensation	299
	7.5.6	Satisfaction	300
7.6	Invoca	tion of state responsibility	301
	7.6.1	The injured state	301
	7.6.2	The non-injured state	302
	7.6.3	Plurality of injured or responsible states	303
		Countermeasures	303
7.7	The sta	ate's diplomatic protection over its natural and juristic	

	persons	304
7.8	Conclusions	306

xi

Public	international	law
1 none	manonai	iun

8	Internat	ional law and the use of force	307
8.1	Develo	opment of the law on the use of force in international	
	law		308
	8.1.1	Early attempts to regulate the use of force	308
	8.1.2		309
		The Age of Enlightenment	309
		Early twentieth century	310
		The League of Nations	311
8.2	The U	nited Nations and the post-war system of collective	
	securit		313
	8.2.1	The meaning of 'force' and 'threat of force'	313
	8.2.2		
		political independence'	315
8.3		tion and intervention	316
		Non-international armed conflicts	316
		Delivery of humanitarian aid	317
		Regional peacekeeping and enforcement actions	319
8.4	Huma	nitarian intervention	320
	8.4.1		321
	8.4.2	Legitimacy and the future of humanitarian	
		intervention	325
8.5		tion to the rule: self-defence and collective self-defence	326
	8.5.1	1	326
	8.5.2		327
		Collective self-defence	331
	8.5.4	1 2	333
	8.5.5	1 1	334
8.6		tion to the rule: Chapter VII authority of the Security	
	Counc		335
	8.6.1	Responsibility to protect	338
8.7	Conclu	usions	340
9	Pacific r	esolution of disputes	343
9.1	The le	gal framework	343
9.2	Non-j	udicial settlement procedures (non-binding)	344
	9.2.1	Negotiation	344
		Inquiry	345
	9.2.3	Good offices	346
	9.2.4	Mediation and conciliation	347
	9.2.5	The general role of the United Nations	347

xii

9.3	International arbitration (binding)	348
	9.3.1 Diplomatic protection: admissibility of state claims	349
9.4		351
	9.4.1 WTO Appellate Body	352
	9.4.2 International Tribunal for the Law of the Sea	352
	9.4.3 International Criminal Court	353
	9.4.4 Human rights mechanisms	354
9.5	International Court of Justice	355
	9.5.1 Procedure and practice: admissibility and organization	355
	9.5.2 Role and jurisdiction	356
	9.5.2.1 Applicable law and general jurisdiction	356
	9.5.2.2 Preliminary considerations	357
	9.5.2.3 Contentious jurisdiction	358
	9.5.2.3.1 Special agreements	358
	9.5.2.3.2 Forum prorogatum	359
	9.5.2.3.3 Treaties providing jurisdiction	360
	9.5.2.3.4 Optional clause	360
	9.5.3 Terminating a declaration	361
	9.5.4 Provisional measures	362
	9.5.5 Remedies and enforcement	363
	9.5.6 Advisory Opinions	364
9.6	Conclusions	365

Contents

Index

367

xiii