Contents

Preface xiv
List of abbreviations xvi
List of selected cases xviii

1 International law: history, theory and purpose 1

1.1 The approach to international law in this book 1
1.2 The concept of international law 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 Article 38(1) ICJ Statute 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 – jus cogens 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
      2.2.2.2.1 Consistency of state practice 75
      2.2.2.2.2 Kinds of state practice – acts, omissions and acquiescence 77
    2.2.2.3 Quantity of state practice 79
    2.2.2.3.1 General sources of evidence of opinio juris 80

2.2.2.3.2 Treaty obligations as evidence of *opinio juris* 84
2.2.2.3.3 UN General Assembly resolutions as evidence of *opinio juris* 86
2.2.2.4 Challenges to the traditional elements of custom 89
2.2.2.5 Treatment by international courts and tribunals 91
2.2.2.6 The persistent objector exception 93
2.2.2.7 *Jus cogens* 95
2.2.2.8 *Erga omnes* obligations 101
2.2.2.9 Regional custom 102
2.2.3 General principles of law 105
2.2.3.1 The nature and role of general principles of law 105
2.2.3.2 The identification of general principles by international courts and tribunals 108
2.2.3.3 *Non liquet* in international law 109
2.2.4 Judicial decisions and highly regarded publicists – subsidiary sources 110
2.2.4.1 Judicial decisions 110
2.2.4.1.1 No precedent in international law: Article 59 ICJ Statute 110
2.2.4.1.2 A *de facto* normative system of precedent at international law? 112
2.2.4.2 Writings of publicists 114
2.2.5 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
3.4.1 Transformation 136
3.4.2 Incorporation 137
3.4.3 The implementation of customary international law into national law 138
  3.4.3.1 Common law states 138
  3.4.3.1.1 The United Kingdom 138
  3.4.3.1.2 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
  3.4.3.2.2 Portugal and the Netherlands 145
  3.4.3.3 Contemporary developments: growing constitutional recognition of the primacy of customary international law 145
3.4.4 The 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
  3.4.4.1.2 The United States 148
  3.4.4.1.3 Australia 149
  3.4.4.2 Civil law states 151
  3.4.4.2.1 Germany 151
  3.4.4.2.2 Japan 151
  3.4.4.2.3 The Netherlands 151
  3.4.4.3 Contemporary developments: automatic incorporation of treaty law into domestic law 152
3.5 Conclusions 153

4 The subjects of international law: states 155

4.1 The nature of the personality of states in international law 157
4.2 Sovereignty 158
4.3 Traditional criteria for statehood 161
  4.3.1 First criterion: permanent population 162
  4.3.2 Second criterion: territory 163
  4.3.3 Third criterion: government 165
  4.3.4 Fourth criterion: capacity to enter into legal relations 167
4.4 Recognition 168
  4.4.1 Political recognition of statehood 169
  4.4.2 Declaratory and constitutive theories of recognition 172
  4.4.3 De facto and de jure recognition 173
  4.4.4 Current recognition practice 174
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 – 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 administration 191
    4.6.6.4 Changing values in the international community and the principle of stability 191
4.7 Scope of territorial sovereignty 192
4.8 Future directions in territorial sovereignty 193
4.9 Peoples and self-determination 194
  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 197
  4.9.2 Decolonization and uti possidetis 199
  4.9.3 Recent developments 200
  4.9.4 Self-determination and recognition in the current climate 203
4.10 Conclusions 204

5 Other subjects of international law: non-state actors and international law’s evolution 207
5.1 International organizations 209
  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
Public international law

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’: *aut 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
6.5.4.2.1  Diplomatic and consular immunity 276

6.6  Conclusions 278

7  State responsibility 280

7.1  The ILC Articles and the changing discourse of state responsibility 281
   7.1.1  The long road to codification 281
   7.1.2  Significance of the Articles 282
7.2  Internationally wrongful acts 283
7.3  The rules of attribution 284
   7.3.1  State organs 284
   7.3.2  Governmental authority 285
   7.3.3  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  Circumstances precluding wrongfulness 292
   7.4.1  Consent 292
   7.4.2  Self-defence 293
   7.4.3  Force majeure 293
   7.4.4  Distress 294
   7.4.5  Necessity 294
7.5  Consequences of breach 296
   7.5.1  Cessation 296
   7.5.2  Assurances and guarantees of non-repetition 297
   7.5.3  Reparations 297
   7.5.4  Restitution 299
   7.5.5  Compensation 299
   7.5.6  Satisfaction 300
7.6  Invocation 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
   7.6.4  Countermeasures 303
7.7  The state’s diplomatic protection over its natural and juristic persons 304
7.8  Conclusions 306
8 International law and the use of force

8.1 Development of the law on the use of force in international law
    8.1.1 Early attempts to regulate the use of force
    8.1.2 Early religious doctrines
    8.1.3 The Age of Enlightenment
    8.1.4 Early twentieth century
    8.1.5 The League of Nations

8.2 The United Nations and the post-war system of collective security
    8.2.1 The meaning of ‘force’ and ‘threat of force’
    8.2.2 The meaning of ‘against the territorial integrity or political independence’

8.3 Invitation and intervention
    8.3.1 Non-international armed conflicts
    8.3.2 Delivery of humanitarian aid
    8.3.3 Regional peacekeeping and enforcement actions

8.4 Humanitarian intervention
    8.4.1 Sovereignty and humanitarian intervention
    8.4.2 Legitimacy and the future of humanitarian intervention

8.5 Exception to the rule: self-defence and collective self-defence
    8.5.1 Development of self-defence
    8.5.2 Self-defence under the UN Charter
    8.5.3 Collective self-defence
    8.5.4 Status of anticipatory self-defence
    8.5.5 Self-defence and pre-emption

8.6 Exception to the rule: Chapter VII authority of the Security Council
    8.6.1 Responsibility to protect

8.7 Conclusions

9 Pacific resolution of disputes

9.1 The legal framework
9.2 Non-judicial settlement procedures (non-binding)
    9.2.1 Negotiation
    9.2.2 Inquiry
    9.2.3 Good offices
    9.2.4 Mediation and conciliation
    9.2.5 The general role of the United Nations
9.3 International arbitration (binding) 348
  9.3.1 Diplomatic protection: admissibility of state claims 349
9.4 International tribunals (binding) 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

Index 367