PART II

INTERNATIONAL LAW AS A SYSTEM

CHAPTER VI

PERSONALITY AND PARTICIPATION

“It is the world of words that creates the world of things.”


A. A Relational Process between Participants

218. In Part I we explored various difficulties with the idea of international law, focusing on the identification of particular rules of law — how legal rules could exist in a decentralized society of sovereigns, how new international law rules could be made by custom and treaty and whether international law rules are sufficiently determinate to provide guidance in particular cases.

219. Next we will examine a number of questions concerned with the premise, or assumption, that international law is a system and not just a set of rules. After all, for all the difficulties relating to their identification and application, no one in their right mind would deny that there are rules of international law. For example the rule of diplomatic precedence articulated at the Congress of Vienna in 1815 387 and now incorporated in Article 14 of the Vienna Convention on Diplomatic Relations 388 is a legal rule. But international law might only be an assortment of such rules — just like the

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inhabitants of a village might have a rule that you can pasture cows on the village green in summer, and that you must wear a suit on Sunday. Is international law only an assortment or set of rules that happen to be generally accepted as such, but which have no other link? The rules I have mentioned have nothing in common except that they are accepted in the village. Is international law like this village?

220. This first chapter of Part II is divided into two parts. In the first part we investigate further the assumption that international law is a system and not merely a miscellany of primary rules. The distinction has implications also for how legal rules may be applied. For example, reasoning by analogy is employed in legal systems, premised on an assumption of commonality or coherence. We must ask to what degree such commonality or coherence exists, or can exist, at the international level.

221. The challenge to international law’s systemic character is that, with the rise of positivism, the making of international law is represented as a wholly amorphous process, unconstrained by the accepted set of natural law beliefs that the founding writers such as Grotius and Pufendorf held and which we no longer hold in common. But I will suggest that international law is a legal system because it is a function of a social process between States and other persons — a key aspect of the structuring of human relations beyond the State. In these and other ways, it is more than just disconnected rules.

222. If international law is to be assumed a system, however, there are five difficulties that need to be addressed, and will be addressed in the five chapters in Part II. First is the issue of participation, encapsulated in the problem of personality; second, the duality of international law and national law, expressed in the well-known but problematic formula of the dédoublement fonctionnel (how, paid by one system, can judges loyally serve another?); third, the impossibility of multilateralism when multilateral bonds can apparently always be reduced to disconnected bilateral relations; fourth, the connected concepts of proliferation, fragmentation and purportedly self-contained regimes; and fifth, the extent to which

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international law is truly universal and not merely a function of a passing European predominance.

223. In the second part of this chapter, we examine the first of these difficulties: personality and participation in international law. The core problem may be identified immediately. International law affects everyone but participation in the international law system is very unevenly distributed. Traditionally, only States were considered subjects of international law, but this is no longer true. The problem is that we have no equivalent simple criterion to replace that of statehood. In effect, the criterion or test for whether one participates in international affairs now is whether one participates in international affairs — an obvious circularity. But first something more should be said about the character of international law as a system.

1. Conceptions of a “system” of law

224. International lawyers commonly speak and think of their subject as a system. Yet according to one of the most influential twentieth-century accounts, they are wrong. H. L. A. Hart saw the foundations of a legal system in the union of primary rules — those conferring rights or imposing obligations — and secondary rules — those determining how the primary rules are made, changed, adjudicated and enforced. While Hart supported the character of international law as “law” (since the primary rules of a simple or “primitive” society can still be counted as law), he doubted its description as a legal system. In his view:

“there is no basic rule providing general criteria of validity for the rules of international law. . . The rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties.”

Hart owed this idea of a “basic rule” to Kelsen’s Grundnorm. But Kelsen never doubted that international law had a Grundnorm: his

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393. Ibid., p. 236. Other grounds include the absence of secondary rules and an “international legislature, courts with compulsory jurisdiction and centrally organized sanctions”: ibid., p. 214.
doubt rather concerned whether the international law *Grundnorm* was or was not by a form of delegation also the *Grundnorm* of all legal systems — the grundest of all norms, so to speak.\(^{394}\)

225. Even so, Hart has identified a problem, which Kelsen’s abstract hypothesis of the *Grundnorm* fails to resolve. Consider the breach of a bilateral agreement. The rules of international law, according to Article 33 (1) of the UN Charter, call for pacific settlement of disputes. Depending on the dispute settlement provisions of the treaty, the injured State has a right to notify the responsible State of its injury and elect a remedy, among other things.\(^{395}\) If an arrangement is reached without arbitration or judicial dispute settlement, the problem has been resolved by the entities themselves, without resort to an external authority.\(^{396}\) But there are few mechanisms for ensuring that this self-regulating arrangement is consistent with the framework of international law: it might not be, and the articles of the Vienna Convention on the Law of Treaties regarding the relations between treaties do not begin to solve that problem.\(^{397}\)

226. But perhaps to require that they should do so *a priori* is to ask too much. Joseph Raz does not consider “legal system” a technical term, preferring instead to use it as a way of informing thinking about how law works.\(^{398}\) He more loosely characterizes it as “intricate webs of interconnected laws” — which international law no doubt satisfies at least at an elementary level by its large volume of conventional and customary law, moderated by common rules of interpretation.


\(^{399}\) Raz, *Concept of a Legal System*, op. cit., p. 183.
227. According to Raz, continuity of a legal system is not necessarily disrupted by the creation of new original laws — laws not authorized by another law — even though emanating from a different sub-system\(^{400}\). This is an important point for international law, because treaties with varying membership and different subject matter establish new rules and institutions on the international plane. The WTO did not authorize the establishment of the ICC, nor did the Security Council — so in this sense the Rome Statute could be seen as an original law — yet all these institutions are congeneres of international law.

2. The coherence challenge

228. Although international law lacks institutional infrastructure, the inference that this renders it unable to work in a systematic way cannot be sustained. The International Court, in its Advisory Opinion on the WHO Regional Headquarters, rightly observed that a rule of international law “does not operate in a vacuum” but operates with “relation to facts and in the context of a wider framework of legal rules of which it forms only a part”\(^{401}\). Likewise, Judge Greenwood asserted in Diallo (Compensation) that international law “is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law”\(^{402}\).

229. This view was also favoured by the International Law Commission (ILC), which extensively studied challenges of fragmentation and proliferation raised by the emergence of “technically specialized cooperation networks with a global scope” such as trade, human rights, environment, diplomacy and communications. In examining methods of resolving conflicts between special and general international law, conflicts between successive norms and systemic integration, Special Rapporteur Koskenniemi provided a comprehensive analysis of topical issues that, according to some traditional views, threaten the notion that international law is a system.

But the ILC’s conclusion was the opposite: “International law is a legal system”\textsuperscript{403}, and specialized topics that emerge within international law do not erode the systematization of international law\textsuperscript{404}.

230. The ILC suggested that the rules and principles of international law “act in relation to and should be interpreted against the background of other rules and principles”, emphasizing that “international law is not a random collection of such norms”\textsuperscript{405}. The capacity of States to modify the system is also in practice curtailed. As Pauwelyn explains:

“[I]n their treaty relations states can ‘contract out’ of one, more or, in theory, all rules of international law (other than those of \textit{jus cogens}), but they cannot contract out of the \textit{system} of international law.”\textsuperscript{406}

The reason States cannot contract out of the system of international law is not that the system itself is peremptory; it is that it is necessary, if anything lasting is to be achieved at the international level. Imagine for a moment that a State attempts to contract out of the \textit{pacta sunt servanda} principle\textsuperscript{407}. It will still have to make promises in order to achieve its purposes, but other States have no reason to take its promises seriously. Perhaps the State may assure its “co-contracting” party that it intends that particular promise to be binding. But its general disavowal of the binding character of its promises would apply equally to this assurance. \textit{Pacta sunt servanda} is not a peremptory norm, but it is a necessary one for States’ promises to be taken seriously. States are serial promisors and the institution of formal promising — treaty making — entails the norm \textit{pacta sunt servanda}. States’ fondness for international law may ebb and flow, but the system remains.


\textsuperscript{404} Ibid., p. 405 (para. 245).

\textsuperscript{405} Ibid., p. 407 (para. 251).


3. The relation between international law and international society: transnational rules lacking societies

231. Raz makes the vital point that legal systems are not distinct and separate from the societies that create and apply them. Legal systems are complex forms of life and involve a process of social interaction, through which shared legal norms are created and maintained over time. At the international level, patterns of social interaction are held out to be legitimate or proper, and are treated as operating within a system of international law.

232. It is true that attempts have been made to “constitute” systems of law divorced from social systems. A notable example is the idea of le mercatoria postulated by French comparatist Berthold Goldman and developed further by institutions such as UNIDROIT. The problem with it is that it is a pure confection, unrelated to any real source of authority or any existing praxis. It is a law of and for professors, a Buchrecht reduced to a single book, based on the assumption that comparative law techniques can distil a true or real underlying common law — a sort of natural law without the benefit of divinity. The assumption is demonstrably untrue.

233. Perhaps the most comprehensive attempt to distil an international common core of contract law, applicable to private actors, was the 10-year long comparative assessment of the law relating to formation of contracts conducted at Cornell University by Rudolf 408. See, e.g., Raz, Concept of a Legal System, op. cit., p. 188.


Schlesinger, with the aim to “enhance professional knowledge . . . by finding and formulating the common ground as well as the differences among legal systems” and to test the feasibility of its research method. The study concluded with “haphazard” if not rather abstract observations, among which was the “expected” finding that “the areas of agreement are larger than those of disagreement” but that areas of disagreement were more complex than anticipated. Despite the intelligent choice of topic — after all, formation of contract is prior to contract — this outcome was disappointing; an “insular study of a peripheral subject”, in the words of one reviewer. Schlesinger’s own reflective question after 10 years’ work, “did we merely demonstrate the obvious?”, supports the sceptics of a synoptic universal contract law.

234. More recently, Ole Lando has also pursued the quest for European systemic legal integration through the Principles of European Contract Law project, born of the European Parliament’s desire to establish a common European civil law. The Lando Commission seek to forge a new European jus commune and elucidate a model set of “general rules” for a uniform regional contract law system to be applied in European business-to-business and business-to-consumer contracts. The project has grown in ambition, leading to the proposed Draft Common Frame of Reference, which purports to codify the whole of European contract law.

235. There are enormous difficulties with the idea that such “codes” can identify an “essence” distilled from the different legal

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systems which could be applied in transnational cases. For one thing, the assumption is that the detailed examination of legal systems will produce a common core. In practice, the more comparative lawyers search for a common core, the more elusive it seems to be. As Martin Shapiro notes: “I do not know whether ‘common core’ is a lesser or greater acknowledgement of defeat than ‘principles’ but surely it is in the same neighbourhood.” In fact it is in no neighbourhood at all. Lex mercatoria is not the law of any individual human society, still less a society of merchants or even of professors, it is an abstraction that still fails to remain insulated from the legal and policy preferences of its proponents.

4. International law is a system, even if imperfect

236. In short, legal systems are social systems. While it is no doubt good for international and comparative lawyers to socialize, even a willing society is not only composed of cocktail parties. There is an international social process, defective no doubt, but existent, made up of the actions, interactions and programmes of Governments and significant others.

237. The working of international law reveals a “complete” system of laws, albeit one that cannot be uncritically analogized to domestic legal systems. It is a legal system because it is a function of the social process between States and other persons regarding matters of common concern. As Ian Brownlie notes, international law provides both the vocabulary and underlying grammar of interstate relations. Indeed, it is impossible to imagine international

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diplomacy and relations without international law. International law has the characteristics of a system, not just a random collection of rules: notably, the basic constructs of personality, sources, treaties, interpretation and responsibility. The system is a superstructure, if you like, but only in the Marxist sense that all law is a superstructure. It is made up of conventional and customary rules that interact, interlink, reinforce each other and sufficiently cohere. Those who worry about its institutional deficiencies may recall Richard Gardiner’s proposition that the institutional framework for securing observance of most international obligations is diplomacy and then international organizations — with an increasingly important role for international courts and tribunals.

But if international law is a social system, who are its participants? This brings us to the second part of this chapter and the problem of international personality.

B. The Problem of International Personality

It is now generally accepted that under international law natural persons, and certain legal persons, may be beneficiaries of rights and holders of obligations. But this has not always been so. In 1904, international law was canonically seen as a system designed exclusively by States exclusively for States — as a system with 73 participants, 74 including the Pope. The expansion of the personal scope of international law since that time is remarkable for many reasons, not least because it acknowledges that natural persons are entitled to protection and that participation in the system is no longer

425. Crawford, Brownlie’s Principles of Public International Law, op. cit., p. 16.
428. See Oppenheim, op. cit., for a list of States at that time. The territorial status of the Papacy was at the time unresolved: the Vatican City was not established until the Lateran Treaty (Italy-Holy See), Rome, 11 February 1929 (in force, 7 June 1929), (1929) 23 AJIL Supp. 187; 130 BFSP 791. See J. Crawford, The Creation of States in International Law (Oxford, OUP, 2nd ed., 2006), pp. 221-233.
limited to States. But it also brings new challenges, a selection of which include: ascertaining the criteria for statehood in international law and their connections to the institution of recognition; managing the horizontal effects of actors other than States in the international system; and establishing mechanisms to hold non-State participants to account.

1. Recognition and subjectivity of legal personality

   240. In Chapter III we discussed the relationship between sovereignty and statehood. Statehood is essentially a product of international law, but there is enduring debate about the legal criteria for statehood. The standardly-cited Montevideo formula lists as criteria defined territory, permanent population, stable government and the capacity to enter into relations with other States. This has multiple defects: it is inaccurate (territory may not be defined), tendentious (whether a population is permanent depends partly on whether the people have their own State) and question-begging (the phrase “other States” assumes what it seeks to demonstrate, i.e. that we already know what a State is). But above all it is incomplete in three crucial respects. First, it leaves out independence from other States, which is nonetheless (once securely established) the “decisive criterion of statehood”. Second it ignores the role of international law in determining or precluding statehood in certain important cases: these are the exceptional situations where international law either declines to accept a for-the-time-being effective entity as a State for reasons of its substantive illegality — as was the case with Manchukuo, Southern Rhodesia and the “bantustans” — or accepts as continuing in existence entities which are for-the-time-being suppressed — as with Ethiopia in 1935, the Baltic...
States after 1940, Kuwait under Iraqi occupation in 1990, and some others. Third, it says nothing whatever about recognition by other States; but such recognition is undeniably relevant to statehood, whatever “theory” of recognition one may choose to adopt.

241. In truth the best theory of recognition may be none at all. The declaratory theory (the theory that statehood is independent of recognition) overlooks the great significance attributed to recognition in the practice of States. If recognition did not matter, Taiwan would be a State, Somaliland would be a State; yet according to the standard view neither is. On the other hand, as under the constitutive theory, if recognition were decisive then Kosovo (97 recognitions) and Palestine (132 recognitions) would be States — whereas there are still questions about both. Indeed if recognition even by one State were decisive, so would the Turkish Republic of Northern Cyprus (1 recognition), South Ossetia (2 recognitions) and Abkhazia (2 recognitions). Ian Brownlie compares such theories to a “bank of fog on a still day”: they obscure rather than illuminate. In these theories the complexity of legal issues in international relations “has been compacted into a doctrinal dispute between the ‘declaratory’ and ‘constitutive’ views”, without adding to the sum of human knowledge. Plainly recognition is a political process interposed by unilateral assessment by a State deciding whether or not it will recognize another as a State and thereby engage in normal political and legal relations with that other State.

242. But recognition should not be construed as a magical spell that gives life to an unborn State. Unlike Hamlet’s proclamation to Rosencrantz, it cannot be said that whether a State does or does not exist, individual recognition makes it so. Here again the Montevideo Convention is defectively formulated: Article 3 declares

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441. With apologies to Shakespeare. Hamlet, Act 2, Scene 2, ll. 249-251.
that “[t]he political existence of the state is independent of recognition by the other states”⁴⁴²: it had better said, independent of recognition by any individual third State.

243. What of legal barriers to recognition, or conversely, the duty to recognize⁴⁴³? In the Kosovo Opinion the International Court was careful not to say more about controversial issues of contested independence than was necessary for the purposes of answering the question put by the General Assembly, as to whether the Kosovar Declaration of Independence was unlawful. In particular it declined (as the Canadian Supreme Court had earlier declined⁴⁴⁴) to say whether the idea of “remedial secession” has any purchase in international law as an extension of the principle of self-determination. Some Governments (notably Germany) had supported the idea, which was prima facie more applicable to Kosovo in view of its recent history than it would have been to Quebec⁴⁴⁵. The Court said:

“During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence . . . Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation . . . A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context.


The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”

After referring to cases of Security Council-mandated non-recognition (Southern Rhodesia, Northern Cyprus), the Court continued:

“in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens). In the context of Kosovo, the Security Council has never taken this position.”

For the purposes of the answering the question this short essay on general international law was sufficient.

244. Beyond the class of well-established entities with legal personality are entities that are proximate to States or are treated like States for certain purposes. Take Taiwan as an example. While it is not recognized as a State by anyone, it has proto-State international legal identity for various purposes, including as a fishing entity under the Law of the Sea Convention 1982 and as a sepa-

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446. ICJ Reports 2010, p. 436 (para. 79).
447. Ibid., p. 438 (para. 81).
rate customs territory for the purposes of WTO membership\textsuperscript{450}. Somaliland may be another example. Even though it is a self-declared, yet contested, secessionist region, it has maintained \textit{de facto} independence for a considerable period of time and participates on the international plane, for example as a refugee-receiving entity\textsuperscript{451}.

245. Palestine is a more controversial case\textsuperscript{452}. The status of Palestine (West Bank and Gaza Strip) remains subject to vehement debate. Even though the people of Palestine are undoubtedly entitled to full self-determination, Israel has long denied its statehood pending resolution of a range of issues through “permanent status negotiations”, for a long time stalled\textsuperscript{453}. Palestine’s request for full UN membership is undetermined but it has recently been accorded “non-member observer State” status by the General Assembly\textsuperscript{454} — the same status as the Holy See. UNESCO’s earlier admission of Palestine resulted in the withdrawal of US funding to that organization\textsuperscript{455}. But with 132 States now recognizing Palestine as a State, it seems to be eking its way toward statehood\textsuperscript{456}.

2. \textit{Participation and effect at the horizontal level}

246. The international legal system is further enriched — or complicated — by the participation of entities without any territorial


\textsuperscript{453} Declaration of Principles of Interim Self-Government Arrangements, 13 September 1993, 32 \textit{ILM} 1527.

\textsuperscript{454} UN doc. A/67/L.28, 25 November 2012, para. 2; GA res. 67/19, 29 November 2012, p. 3 (para. 2).

\textsuperscript{455} Public Law 103-236, §410 (1), 30 April 1994, 108 Stat. 454 (1994) prohibits the United States making any voluntary or assessed contribution to “any affiliated organisation of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood”.

base of their own. The International Court first faced up to this question in the *Reparation* case, holding that:

“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights . . . Throughout its history, the development of international law has been influenced by the requirements of international life, and 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 . . . In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane . . . the Organization is an international person . . . a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”

It is a mark of international law’s conservatism that it took until 1949 for the separate legal personality of an international legal organization like the United Nations to be recognized. The status of its predecessor, the League of Nations, for example, remained unsettled, such that the Secretary-General of the League apparently had to sign contracts of employment in his personal capacity.

247. The question following *Reparation* was whether this idea of the legal personality of international organizations was limited to organizations having universal aspirations such as the United Nations or whether it applied more widely. The International Court left this question open, perhaps implying the narrower view, but in

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practice a very large number of organizations have been established by States, sometimes even on a bilateral basis, that are said to have and seem to be accepted as having international legal personality.\textsuperscript{459}

248. So just as has occurred with the corporate form at the national level, the separate corporate personality of international organizations has become a basic tool, widely available to States and to organizations themselves (some international organizations have created separate international organizations\textsuperscript{460}). International organizations are a manifestation of collective State action to address shared concerns, including public health, environment, trade and climate change. To advance common interests international organizations establish international standards (e.g., International Telecommunication Union, WHO, WTO), impose mandatory action on States (e.g., the Security Council) and implement and enforce rules (e.g., international courts and tribunals)\textsuperscript{461}.

249. The next question is whether the principle of international legal personality declared by the International Court extends further than international organizations of an inter-State character. In 	extit{Barcelona Traction} the International Court expressed the position in the following way: “international law has had to recognize the corporate entity as an institution created by States” that has become a “powerful factor in the economic life of nations”\textsuperscript{462}.

\textsuperscript{459} There is no definitive list of international organizations: C. F. Amerasinghe, \textit{Principles of the Institutional Law of International Organisations} (Cambridge, CUP, 2nd ed., 2005), p. 5. The \textit{International Yearbook of International Organisations} (2009/2010) states that there were at that point 241 “conventional” intergovernmental organizations: Figure 2.9.

\textsuperscript{460} For example, the member States of the Organisation for Economic Co-operation and Development established the International Energy Agency as an autonomous body within the framework of the Organisation, in response to the oil crisis at that time, pursuant to its Decision of the Council Establishing the International Energy Agency of the Organisation, OECD Council, 373rd meeting, 15 November 1974 (in force, 15 November 1974), Art. 1.

\textsuperscript{461} That international organizations may enter into treaties is now widely accepted: Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 21 March 1986 (not in force), 25 \textit{ILM} 543. Not all organizations that operate on the international plane unequivocally possess international legal personality, and those that do may have restricted competence: e.g., the earlier Commonwealth of Nations; UN Conference on Trade and Development; the High Commissioner for Refugees. See, e.g., J. E. S. Fawcett, \textit{British Commonwealth in International Law} (London, Stevens & Sons, 1963); W. Dale, “Is the Commonwealth an Organisation” (1982) 31 \textit{ICLQ}: F. Morgenstern, \textit{Legal Problems of International Organizations} (Cambridge, Grotius, 1986), pp. 23-26.

250. It is true that there are examples of domestic associations that came to be accepted as international persons. Thus the International Committee of the Red Cross (ICRC) was formed as a private humanitarian initiative, sanctioned by a diplomatic conference in 1863. In 1915 it was formally established as a Swiss organization. It has now developed a dual character. From an organizational point of view it remains a Swiss entity, yet it is increasingly recognized as performing public international functions and it is clear that the ICRC is as a separate international legal person in respect of the exercise of those functions — a status recognized by the Red Cross Conventions of 1949, by the Security Council and (in the context of non-disclosure of information) by the ICTY.

251. Another example, also Swiss, is the Bank for International Settlements (BIS), established in 1930 at a time when it was not clear that a bank could be established by international law and become an international person. In 1987 the BIS was reconstituted and recognized as an international legal person; it has


466. Ibid.
since concluded treaties and been sued at the international level\textsuperscript{467}. Dozens of international and regional banks now exist.

252. But the category of corporate actors remains an \textit{ad hoc} one. So far, several other corporate entities have been treated differently. The International Court has always insisted that corporations are created and regulated by States even if they operate well beyond the limits of the State of incorporation; it said so in \textit{Anglo Iranian Oil}\textsuperscript{468}, and maintained that position in \textit{Barcelona Traction}\textsuperscript{469} and latterly \textit{Diallo}\textsuperscript{470}.

253. Elsewhere, there is some tendency to elevate the status of transnational corporations, with the apparent aim of increasing their accountability. Numerous treaties impose obligations on States to regulate the conduct of corporations; and corporations have invoked human rights under regional human rights treaties\textsuperscript{471}. But there appear to be no express obligations in international human rights law imposed directly on corporations: the development of a general law of international responsibility has focused almost exclusively on States and, by derivation, international organizations. Insofar as international law has recognized direct criminal responsibility, it has done so with respect to individuals, not corporations. None of the constituent instruments of the international criminal tribunals provide for corporate criminal responsibility: “no international criminal tribunal has had jurisdiction to try a company as a legal entity for crimes under international law”\textsuperscript{472}.

254. This may appear to be unsatisfactory. Some corporate entities are immensely powerful: they generate revenue larger than the GDP of many States, operate on a global basis and exercise

\textsuperscript{467} Reineccius et al. v. Bank for International Settlements, Final Award, 19 September 2003, 140 ILR 1.

\textsuperscript{468} Anglo Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objections, Judgment, ICJ Reports 1952, pp. 102, 112.


considerable influence over domestic affairs. Influence, however, is not the same as legal capacity on the international plane, and the International Court’s insistence that corporations are creatures of domestic law is underwritten by powerful policy concerns to avoid the creation of wholly unaccountable entities. John Ruggie, Special Rapporteur of the Secretary-General on the issue of human rights and transnational corporations, has noted the emerging “governance gaps created by globalisation”, stating:

“The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.”

In 2011 the UN Human Rights Council endorsed Ruggie’s “implementing” framework on business and human rights, which serves to improve international accountability and responsibility through three pillars:

“The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.”

255. Other attempts to improve accountability of corporations and international actors are found in soft law forms, including voluntary codes, agreements and declarations. Such instruments either contain broadly defined standards applicable to transnational activities of corporations (or businesses more broadly) or they are aimed at particular industries. While these instruments have the

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473. UN doc. A/HRC/8/5, 7 April 2008, p. 3 (paras. 1, 3).
476. For example, the Extractive Industries Transparency Initiative <http://www.eiti.org/eiti/principles>.
potential to increase public awareness of human rights issues, they do not treat international actors as legal entities.

256. At the domestic level, there has been no generalized development of a concept of corporate responsibility for violations of, or complicity in State violations of, international human rights law. The principal exception has been the US Alien Tort Claims Act. But the concern here is with legal personality, not powers or obligations. No one denies that States may subject corporations properly within their jurisdiction to regulation that might — if thought useful — extend to liability for breach of international norms. It is another thing to treat corporations as addressees of those norms as such. The Supreme Court in *Kiobel* sidestepped these issues and curtailed the Act’s presumed extraterritorial application, thereby largely barring petitioners from the law of nations occasioned against them when outside US territory.

257. A similar issue arises with respect to non-corporate individuals like you and me. The primary expansion of legal subjects under international law is the recognition and protection of individuals and peoples through human rights law — a sub-category of individual rights. It is now incumbent upon States to satisfy a range of positive and negative obligations, such as to provide a fair trial and to refrain from unlawful killing and torture. But human rights law

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479. Economic protection to private actors has also expanded considerably, with over 2,500 bilateral investment treaties now in force: see Crawford, *Brownlie’s Principles of Public International Law, op. cit.*, Chap. 28 for a summary.

does not yet apply horizontally between individuals in parallel of, or substitution for, national law. It consists of obligations owed by the State to all people, nationals or aliens, within its territory.

258. It must also be noted that while the rights of the individual are well developed, the rights of “peoples” as a category are less advanced. Certain rights relating to equality, international peace and security, permanent sovereignty over natural resources, development, environment and minorities have been said to apply to persons who constitute a group or to the group itself, but the full embrace of third generation rights, particularly of an economic, social or cultural kind, is still in its infancy — no longer precocious after 30 years. Some progress has occurred, however, with the international recognition of indigenous rights, further expanding the range of rights recognized on the international plane as well as the range of beneficiaries.

259. There is also a marked disjunction between the considerable expansion of individual rights under international law and the limited scope of individual responsibility. The direct responsibility of individuals is still limited to the field of international criminal law, and only to certain crimes within that field. With respect to these crimes however, individual responsibility is a matter of customary international law: the customary international law origins of individual criminal responsibility stem from the Nuremberg trials and have been advanced through the rapid creation of international and hybrid criminal courts and tribunals since 1992.

260. In any event, to have rights or obligations is not the same thing as being a subject of international law: otherwise the term would lack all utility. For one thing, the obligations are disconnected from the rights, forming a different sub-field, for another thing, there

481. See J. Crawford, “The Rights of Peoples: ‘Peoples’ or ‘Governments’?” in International Law as an Open System: Selected Essays (London, Cameron May, 2002), Chap. 7. For discussion of substantive rights consequent to recognition of peoples before the law, see Chap. XI.


is no inherent capacity for the individual to vindicate those rights, except for specific procedures established by States, and so far unevenly available. This is not to deprecate or devalue the progress made in the field of human rights since 1948, but to put it in its proper legal context.

C. Conclusion

261. The present situation of participation in the international legal system is untidy, and is far from Hersch Lauterpacht’s vision of the individual as the “ultimate subject” of international law. There is an expanding range of actors in the international system, but States very much remain the key-holders and gatekeepers of personality. We may ask whether the central function of the State in the international order is still sustainable. A fashionable scholarly view is that it is not, given that there are now other participants who are vital to international relations, such as the European Union, a protean entity which is sometimes treated like a State, sometimes like an international organization, as may be thought convenient. But it remains the case that States retain the prerogative of domestic and international governance, delegated ad hoc or by treaty but not abandoned. The international law of personality is no doubt more open today, but for key purposes it is still a law of exclusion, not participation.

484. See Crawford, Brownlie’s Principles of Public International Law, op. cit., Chap. 29 for a summary.
486. For example VCLT, op. cit., Art. 53, limits determination of the status and content of peremptory norms to States.
CHAPTER VII

INTERNATIONAL AND NATIONAL LAW: SERVING TWO MASTERS?

“No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.”

Matthew 6:24 (King James edition).

“Laws, in their most general signification, are the necessary relations arising from the nature of things. In this sense all beings have their laws: the Deity His laws, the material world its laws, the intelligences superior to man their laws, the beast their laws, man his laws.”

Baron de Montesquieu, The Spirit of the Laws (1750) 487.

A. The Myth of the “Dédoublement Fonctionnel”

262. Mayors (maires) occupy an important role in French society, possessing a distinctive dual function as both ex officio agents of the State and agents of the commune that they represent as Chief Executive — all 36,681 of them 488. They are appointed from within the ranks of the municipal council members (conseil municipal), by absolute majority in a secret ballot 489. The mayors’ hold on local power is ensured by the Electoral Code, which prevents dismissal except by a decree of the national Council of Ministers 490.

263. In exercising their powers, mayors have a double allegiance. The mayor-as-executive wields local powers that are essentially

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488. Institut national de la statistique et des études économiques, Le Code officiel géographique as at 1 January 2013. For a historic perspective on the duality see W. B. Munro, “The Office of the Mayor in France” (1907) 22 Political Science Quarterly 645-662.
immune from challenge by the council. The mayor is the sole municipal official in charge of local education, town planning, tariffs and certain financial borrowings. The mayor-as-State-agent also has considerable delegated authority for such matters as police, law enforcement and other matters as requested by the State. Here, however, mayoral discretion is not complete — refusal to exercise powers or their negligent discharge triggers the right of the central Government to resume those powers. In addition, the central Government may initiate administrative review of mayoral decisions considered contrary to law. These procedures provide a limited system of checks and balances.

264. At the international level there are no equivalent arrangements for national agencies, including courts and tribunals, whose decisions impact upon international law or relations. If international law is part of a general fabric of law, one might expect there to be systematic links with national legal systems. On the other hand if international law is more like a set of primary rules generated by States exclusively on the international plane, links between the two would more likely be haphazard, pragmatic and unsytematized. So what is the position?

B. The Need for Interaction between International and National Laws

265. Many of the things international law tries to do have to be done at the national level. If diplomatic or State immunities are to be

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492. General Code of Territory, Legislative Party, Part Two, Bk I, Part II, Chap. II, Art. L2122-22. Per Art. L2122-21 the mayor also has power over certain local matters (“under the control of the council and under the administrative control of the state representative in the department”). See also E. Mauritzen and J. H. Svara, Leadership at the Apex: Politicians and Administrators in Western Local Government (Pittsburgh, Univ. Pittsburgh Press, 2002), p. 57; Schapp, Daemen and Ringeling, op. cit., p. 240. For the powers of the municipal council see General Code of Territory, Legislative Party, Part Two, Book I, Part II, Chapter I, ss. 5.


495. General Code of Territory, Legislative Party, Part Two, Bk I, Part III, Chap. I.
given effect by a receiving State, that State has to recognize and implement them as part of its national law — it is not enough to do so as a matter of administrative concession. If it is to avoid committing an internationally wrongful act, the law of the receiving State must grant immunity from prosecution to diplomats, regardless of the merits of the case. If persons are to be extradited, some State official must have authority to lawfully detain them and another official must be authorized to decide when the legal conditions for extradition are met. Human rights are in the first place a matter of national law; so is foreign investment. International law acts in such cases not as a first order definer of rights and duties but as a second order criterion of appropriateness or lawfulness — a critical standard. It operates in many respects in relation to national law; and that might be thought to cast into question its status as a system. These days there are international civil servants — including international judges (full or part time) whose primary allegiance may be supposed to be to the international system as such (or at least to their bit of it). But until the twentieth century there were none or almost none: everyone’s primary allegiance was elsewhere.

266. This presents a challenge. It might seem that international law is a thing of shreds and patches; shreds of international standards, patches upon national law — nothing whole or integrated. But given that the coexistence of the various systems requires interaction on some basis, it is worth exploring what the position might be.

267. A solution was offered by Georges Scelle, who analogized the work of the national courts and other agencies in relation to international law to that of the French mayor. On the one hand, such

496. The term “international organization” is thought to have been first used by Lorimer; the first recognizable international organizations were the river commissions of the Rhine (1815), Elbe (1821), Duoro (1935), Po (1849) and Danube (1856), the legal powers of which varied and included standard setting, judicial determination and immunities. See R. Kolb, “History of International Organizations or Institutions”, in R. Wolfrum, Max Planck Encyclopaedia of Public International Law (Oxford, 2008, online), paras. 3, 14-15, 17. The first full-time employee of a general international organization seems to have been Mr. le Baron Melvil de Lynden, who served as the first Secretary-General of the Permanent Court of Arbitration from 1 October 1900 to 1 August 1901. Sir James Eric Drummond was the first international official of the League of Nations. As Secretary-General of the League Drummond enjoyed privileges and immunities “when engaged on the business of the League”. See F. P. Walters, A History of the League of Nations (Oxford, OUP, 1960), p. 3; Covenant of the League of Nations, Paris, 29 April 1919 (in force, 10 January 1920), [1920] ATS 1, 3, Art. 7.
agencies perform their designated functions in the internal constitutional order. On the other hand, he said, they also act as agents for the international legal system, which has always been and to a large extent still is afflicted by an institutional deficit. Scelle described this as a *dédoublement fonctionnel* or “role splitting”:

> “dans l’ordre interétatique, où il n’existe pas de gouvernants et agents spécifiquement internationaux, les agents et gouvernants étatiques qui les remplacent sont investis d’un double rôle. Ils sont agents et gouvernants nationaux lorsqu’ils fonctionnent dans l’ordre juridique étatique; ils sont agents et gouvernants internationaux lorsqu’ils agissent dans l’ordre juridique international. C’est ce que nous appellerons la loi fondamentale du dédoublement fonctionnel.”

It was through the action of State agents — the *individuals* operating within the respective arms of national or local government — “that international law comes to be given flesh and blood”.

**C. Models of Interaction**

268. Two standard solutions to the problem of municipal law/international law interaction are normally put forward. One is

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497. G. Scelle, “Règles générales du droit de la paix” (1933) 46 Recueil des cours 358. Translation:

> “in the interstate order, where there is no specifically international authorities and agents, the agents and authorities of the State that substitute for them are invested with a *dual role*. They are *national* agents and authorities when operating in the legal order of the State; they are *international* agents and authorities when acting in the international legal order. This is what we call the *fundamental law of role splitting.*” (Emphasis in original.)


498. Cassese, *op. cit.*, 221.

499. For discussion see J. G. Starke, “Monism and Dualism in the Theory of International Law” (1936) 17 BYIL 74-75.
to posit that national and international law are at some level the same; part of a general fabric of law, which calls for integration as a sort of self-recognition of coherence — this goes under the rubric of monism\textsuperscript{500}. The other is to stipulate that the substance of domestic law or national law is different organically from that of international law — this is known as dualism but it might better be referred to as pluralism\textsuperscript{501}. How to reconcile the divisions of power and the interaction of systems with the idea of effective authority has been examined for centuries. For example Samuel Pufendorf termed the German Empire a ‘mis-shapen monster’ because sovereignty was divided between the emperor and the estates”\textsuperscript{502}.

269. But international law is not well suited to such binary classifications, despite their academic popularity. The misleading terms “monism” and “dualism” are more appropriately framed as the ends of a continuum of domestic legal structuring, with much variation in between. Classifying a State’s constitutional design as either monist or dualist is not so much an exercise in absolutes as a matter of degree. Countries with constitutional arrangements reflecting degrees of monism include the civil law States of France, Germany, the Netherlands, Russia and Switzerland. Those that reflect dualist tendencies include States within the common law tradition such as the United Kingdom, United States, South Africa and Australia. But no two States treat foreign relations law or international law in exactly the same way. Even if a State is constitutionally disposed to one approach, State practice demonstrates the concessions made to practical demands of interaction: “intermingling between national


and international legal orders” continues to increase\textsuperscript{503}. Neither theory provides a satisfactory explanation for the practice of international and national courts in articulating the content and design of legal systems\textsuperscript{504}.

\textbf{D. Relations between the Law of Nations and Domestic Legal Systems}

1. Underpinnings to constitutional classification

270. Scholarship on these two standard approaches is historically entwined with an early twentieth-century, primarily European, political debate about the position of the State and the individual and indeed about the separate identity of international law\textsuperscript{505}. Monism was consistent with a new-found focus on the individual as seen in the works of Scelle, Kelsen and Lauterpacht. Dualism on the other hand favoured “restoration of the old classical tradition of voluntarism”, emphasizing the central role of sovereignty, political will and a categorical disjunction of national from international laws\textsuperscript{506}.

271. Hans Kelsen is perhaps the most notable proponent of monism. At the centre of his theory is the Basic Norm or Grundnorm of international law. Kelsen thought of this norm as the ultimate source of validity for all municipal laws — their authority being delegated from international law — rendering international law applicable domestically and superior to municipal law to the extent of any inconsistency\textsuperscript{507}. Kelsen was deeply influenced by moral and political concerns such as democracy, limitations of State power and the flourishing of individual freedoms — as was his student Hersch.

\begin{thebibliography}{9}
\bibitem{505} J. Nijman and A. Nollkaemper (eds.), \textit{New Perspectives on the Divide between National and International Law} (Oxford, OUP, 2007), pp. 6-7, 10. The debate has a historic pedigree when examined in the context of sovereignty, as discussed in Chap. III.
\bibitem{506} Nijman and Nollkaemper, \textit{op. cit.}, pp. 6-7.
\end{thebibliography}
Lauterpacht, an early supporter of human rights. Kelsen was also a fellow sceptic of State sovereignty, though he accepted that it was the “State”, not the civil servants as such, that did the work of international law. As for Georges Scelle, his sociological theory of law “denies essential differences between international and municipal law”, not only because of the links to a voluntarist vision of international law, but because he viewed dualism as destroying the unity of the “law of people”, which he considered supreme law — the *civitas maxima* (“world community”).

272. It is, unfortunately, not so easy, nor does the “world community” work other than as metaphor. Monists ignore the reality that domestic or national law dictates the terms on which international law “comes in” to domestic law. And this preliminary competence is actually allowed or contemplated by international law itself. For international law allows States to have diverse constitutional arrangements, including as to the relations with international law. It may in one sense “delegate” authority to national systems, but it is a rather formalistic notion of delegation, encapsulated in the notion of domestic jurisdiction.

273. If States are in a sense “created” by international law, most States most of the time do not think of themselves as so created; rather they think of themselves as created by their own efforts, as if they were the only State in the world — in the words of the song “if you were the only State in the world and I were the only government”. On this view, international law is *subsequent* to national law. If international law is the law *between* States (as historically conceived), and in some sense is derived beyond the control of domestic constitutional arrangements, by contrast the *locus* of validity of municipal law is a matter which is the first and usually the last place of local constitutional ordering.

274. On this view there is a fundamental discontinuity between the relational order of international law and the “constitutional orga-

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509. Cassese, *op. cit.*, 221.
nization”, or “structure”, of international society; the latter is a function of the thus construed pre-legal entities, the States.

275. A similar view was put by Vattel, that “[e]very sovereign state is free to determine for itself the obligations imposed upon it”\textsuperscript{513}. The individual will of the State was thus interlaced with the collective will of States as the foundation of international law. This view, notably held by Hans Triepel and Dionisio Anzilotti, underpins dualistic thinking\textsuperscript{514}. Dualists conceive of international law as external to that of the State; in Hegel’s words, “the state in and by itself is an ethical whole”\textsuperscript{515}. In this regard, the dualism of international law and municipal law applies \textit{a priori} — there is no “international” sovereign to ensure compliance\textsuperscript{516}.

276. If one is forced to choose, the better view is that dualism, or rather pluralism, provides a closer approximation to reality — “each system is supreme in its own field; neither has hegemony over the other”\textsuperscript{517}. But this is acceptable only if at the same time it is not treated as a recipe for autarchy. This is Jean Cohen’s vision of “constitutional pluralism”, which at its core entails a commitment to co-operation as between the States in managing competing interpretations of legal order\textsuperscript{518}.

\textit{E. International Law in National Legal Orders}

1. Preliminary points

277. The defining feature of the international legal system is the absence of a central organ with general legislative authority, a situation we describe by reference to the principle of the independence and equality of States\textsuperscript{519}. Multilateral treaties substitute for legislation, as we saw in Chapter IV. They are the nearest analogy to

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\textsuperscript{513} See Starke, \textit{op. cit.}, p. 68.


\textsuperscript{517} Crawford, \textit{op. cit.}, p. 110.


\textsuperscript{519} Cf. Austro-German Customs Union case, (1931) PCIJ, Ser. A/B, No. 41, p. 57 (Judge Anzilotti).
legislation that a horizontal, decentralized system can achieve. Conclusion of treaties is attained through the agency of States, and, in particular, the officials of States who negotiate texts then have international agreements implemented domestically through the legislative or judicial process. But this creates separation of power issues which international law does not face and to which many writers looking at the issues from an international law perspective are curiously insensitive. The point is that different separation of powers constraints apply to treaties, to issues of customary international law and to non-justiciability at the international and municipal levels and necessarily so.

278. It is true that courts sometimes use language consistent with dédoublement fonctionnel. In Eichmann the Supreme Court of Israel stated that “in the capacity of a guardian of international law and an agent for its enforcement”, Israel was entitled to prosecute crimes that “shake the international community to its very foundations”\(^\text{520}\). Similar assertions of guardianship were made by the US federal courts in Filártiga\(^\text{521}\) and Yunis. In the latter case the District Court of the District of Columbia held:

“Not only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of world order, but the United States has its own interest in protecting its nationals.”\(^\text{522}\)

But these assertions were not only equivocal; they were effectively self-judging. There was no specific international mandate in either case, such as the clear authority to exercise jurisdiction in various suppression treaties such as the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 5\(^\text{523}\).

279. Scelle himself considered the dédoublement fonctionnel a temporary “make-shift construct” prior to the advancement of the international legal system to a supra-State society\(^\text{524}\). But the inter-

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\(^{521}\) Filártiga v. Peña-Irala, 630 F. 2d 876 (2d Cir. 1980).
\(^{523}\) 974 UNTS 178.
\(^{524}\) G. Scelle, Manuel élémentaire de droit international public (Paris, Domat-Montchrestien, 1943), pp. 22, 190; G. Scelle, “Quelques réflexions
national system has not developed in this manner, with the exception of EU supranationality. The European Union operates on the basis that national courts and officials apply the whole body of European law *ex officio* to cases within their jurisdiction, by virtue of an express legislative or even constitutional mandate to do so, and subject to reference of points of European law to the Court of Justice of the European Community as required. There is no such general mandate at the international level, and of course no reference procedure. In the absence of an express mandate, the assertion that a given court is acting “on behalf of the world community to punish alleged offenders of crimes” is self-imposed.

2. State obligations to effectuate international law domestically

280. International law, or its domestic reflection, is often treated with suspicion by municipal courts, though perhaps with less frequency than used to be the case. Rosalyn Higgins identifies national legal culture and the personal culture of the judges as conditioning responses to international law. In the *International Tin Council* case, Lord Oliver interpreted the International Organisations Act 1968 as *creating* — rather than recognizing — entities with international legal personality. Higgins criticizes this decision for its “striking” and “disturbing” terminology. The extreme manifestation of insularity was Lord Donaldson’s suggestion that an international organization “becomes a person” when “touched by the magic wand of the Order in Council”; such an organization “is not a native, but nor is it a visitor from abroad. It comes from the invisible depths of outer space.”

281. As it happens, international organizations inhabit our one world: for example, regional development banks to which the United Kingdom is not a party hold huge deposits in UK accounts. The UK legislation only deals with the legal personality of organizations of which the United Kingdom is a member, but it neither expressly provides nor implies that other organizations do not exist.

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526. Ibid., p. 48.
527. *Arab Monetary Fund v. Hashim* (No. 3) [1990] 2 All ER 769 at 775.
or may not operate within the United Kingdom — they obviously do both. Yet in *Arab Monetary Fund v. Hashim (No. 3)* the House of Lords was only able to find that the Arab Monetary Fund existed as a legal entity by a *renvoi* to the law of its seat, Bahrain. Apparently international law (like ultra-violet light) has to pass through the filter of a national legal system to be visible.

282. Similar circumspection can be seen in the United States. The Supreme Court allowed the execution of convicted persons despite International Court provisional measures under Article 41 of its Statute requiring postponement of execution to preserve the legal rights of detained subjects under the Vienna Convention on Consular Relations. The Supreme Court held that judgments of the International Court are not binding on domestic courts, but rather matters for executive consideration. This serves to highlight the difficulty of the *dédoublement fonctionnel* in practice. The “leeways for judicial choice” do not permit a judge to circumvent the domestic constitutional process to integrate international law into the municipal order at will. It would be absurd to say that judges cannot apply international law under any circumstances, but to do so, the appropriate processes must be adopted; and these vary with history and constitutional arrangements.

3. Implementing treaty and custom in four systems

283. Generally speaking, the constitutional arrangements of each individual State will be determinative as to the process of implementation and application of international law in its own domestic sphere. There is no unanimity or standardization of approach in this respect — no two constitutions are the same — and it is unhelpful to speak

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531. The United Kingdom maintains a similar position: *R v. Lyons* [2003] 1 AC 976, p. 995 (Lord Hoffman).

in broad generalizations. It is more instructive to reflect on the different approaches to implementation of treaties and custom adopted in four domestic systems — the common law systems of the United Kingdom and the United States, which reflect dualist tendencies, and the predominantly monist civil law traditions of France and Germany.

(a) The United Kingdom

284. In the United Kingdom, signature and ratification of treaties is the constitutional prerogative of the Crown. But as a consequence (since the Crown has no prerogative to change the law) treaties are not self-executing or of direct effect upon ratification: they are binding only on the plane of international law until the Parliament enacts implementing legislation which incorporates or gives effect to the relevant treaty rights and obligations.

Only once so incorporated may the provisions of the relevant treaty, as reflected in the domestic legislation, then be applied by municipal courts. Although the law may mirror the terms of the treaty implemented, it is not the treaty itself but the statute that forms part of English law.

285. This is not to say that unincorporated treaties are of no domestic relevance. There are a number of means by which municipal courts can have regard to standards reflected in unincorporated treaties, including, notably, the presumption of compatibility. This canon of construction creates a “strong presumption in favour of interpreting English law . . . in a way that does not place the United Kingdom in breach of an international law obligation”. This presumption applies to both statutes and to the common law. It is applicable to the former on the basis that it must be presumed that Parliament intended to legislate in conformity with international law, and not in conflict with it; but only insofar as the words of the


535. See further Crawford, op. cit., pp. 62-64.

statute are capable of bearing the desired meaning, i.e. are ambiguous or not clear on their face. 537

286. As to the relationship between common law and customary international law, the approach traditionally taken by the United Kingdom, that of “incorporation” 538, is best described in the words of Lord Denning MR in *Trendtex Trading Corp. v. Central Bank of Nigeria*:

> “Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows . . . inexorably that the rules of international law, as existing from time to time, do form part of English law.” 539

But despite the continued recognition of the “general truth” 540 of this proposition, a more nuanced statement of the relationship between customary international law and the common law of England may be that custom is not a part of English common law but, rather, that it is one of its sources, of which the courts may take judicial notice as appropriate 541.

As put by Roger O’Keefe:

> “What Lord Denning MR in *Trendtex* referred to as the doctrine of incorporation is in reality a statement to the effect that the English courts, where appropriate, may and must create rules of common law *by reference* to rules of customary international law. It is a licence and a direction to the judge to look,
where relevant, to a rule of customary international law operative on the international plane and, in appropriate circumstances, to coin in near enough its image a rule of common law applicable in an English court." 542

(b) The United States

287. As regards the domestic practice and process of the United States, Article VI, paragraph 2, of the Constitution (the “Supremacy Clause”) describes treaties as “the supreme Law of the Land; and the Judges in every state shall be bound thereby; anything in the Constitution or Laws of any State to the Contrary notwithstanding” 543. Treaties will accordingly prevail over state constitutions and laws. As expressed by Justice Sutherland in United States v. Belmont, “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear” 544.

288. It is because of this express constitutional mandate that the United States’ approach to the incorporation of treaties diverges from that of the United Kingdom. But a further distinction is drawn, going back to the 1829 decision of Chief Justice Marshall in Foster v. Neilson 545, between self-executing treaties, which have the same effect as and may even amend Acts of Congress, and non-self-executing treaties, which require implementing legislation to be effective 546.

289. The characterization as a treaty as “self-executing” or not, and the test to be applied in making this determination is a matter of US, not international, law and is subject to significant uncertainty. Since the 1970s, some lower courts have adopted a nuanced “multi-factor” test for determining whether a treaty provision is self-execut-

542. R. O’Keefe, op. cit., p. 59 (emphasis added).
545. 27 US 253 (1829).
546. A treaty is

“to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.” Ibid., p. 314.
However, in its 2008 decision in *Medellin v. Texas* the Supreme Court rejected such a multi-factored approach in determining whether a treaty provision was self-executing, explaining that it was too indeterminate and would improperly “assign to the courts — not the political branches — the primary role in deciding when and how international agreements will be enforced”.

290. The Supreme Court also implicitly rejected the proposition that, in cases of ambiguity, there was a strong presumption that a treaty was self-executing. The Court made it clear that each individual treaty should be considered on its own facts, but also seemed to confirm that the intent of the United States treaty-makers is dispositive on the question of non-self-execution.

291. *Medellin* was also ambiguous as to the domestic effect of unimplemented non-self-executing treaties. However, United

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547. See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F. 2d 370, p. 373 (7th Cir. 1985); *United States v. Postal*, 589 F. 2d 862, p. 877; *People of Saipan v. U.S. Department of Interior*, 502 F. 2d 90, p. 97 (9th Cir. 1974). Relevant factors cited include:

> “the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self- or non-self-execution” (*United States v. Postal*, p. 877, quoting *People of Saipan v. U.S. Department of Interior*, p. 97).


549. 552 US 491, p. 516.


553. The Court held that a non-self-executing treaty does not give rise to domestically enforceable federal law (552 US 491, p. 505, n 2), but failed to clarify whether a non-self-executing treaty is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law. See also Bradley, op. cit., pp. 547-550.
States law provides for a similar presumption of compatibility to that of the United Kingdom. As expressed by Marshall CJ in 1804 in Murray v. Schooner Charming Betsy, “an act of Congress ought never to be construed to violate the law of nations if any other construction remains” 554. As with the United Kingdom, this canon only applies where the statute to be interpreted is ambiguous 555.

292. The classic statement of the relationship between US domestic law and custom was formulated in The Paquete Habana in 1900:

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.” 556

The Restatement (Third) further clarifies this relationship: “[c]ustomary international law is considered to be like common law in the US, but is federal law” 557. But

“[c]ustomary law does not ordinarily confer legal rights on individuals or companies, even rights that might be enforced by a defensive suit such as one to enjoin or to terminate a violation by the United States (or a State) of customary international law” 558.

293. Claims under the Alien Tort Statute (ATS) 559 have hitherto increased the focus on custom as an element of applicable law in the United States. The ATS, which goes back to 1789, provides for federal court jurisdiction for actions brought by an alien for a tort which violates international law (“the law of nations or a treaty of the United States”). Dozens of actions have been brought under this legislation since its “revival” in the 1980s, following the decision in

554. 6 US 64, p. 118 (1804). See also Restatement (Third), §114.
556. 175 US 677, 700 (1900).
557. Restatement (Third), §111, comment (d).
558. Restatement (Third), §111, reporters’ note 4.
559. 28 USC, §1350.
Filártiga v. Peña-Irala that the ATS applied to a wide array of claimed human rights violations. But the Supreme Court has twice moved to narrow the permissible scope of claims under the ATS, perhaps to address its concern that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.” In Sosa v. Alvarez-Machain, the Supreme Court limited federal courts to recognizing causes of action only for alleged violations of international law norms that are “specific, universal, and obligatory.” It further narrowed the potential scope of alien tort claims in its 2013 decision in Kiobel, unanimously holding that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the ATS rebuts that presumption:

“nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality. Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign.”

(c) France

It is misleading to generalize too broadly about a “civil law” approach to international law. However, it is true to say that civil law jurisdictions commonly adopt a monist approach to the incorporation of customary international law into the domestic sphere, frequently through constitutional recognition.

In France, the mode of reception of customary international law is somewhat ambiguous. The Preamble to the Constitution of the Fourth Republic of 27 October 1946 relevantly provided that: “the French republic, true to its traditions, conforms to the rules of international public law.” According to this declaratory provision, international law was applied per se:

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560. 630 F. 2d 876 (2d Cir. 1980).
564. Ibid., 8.
“Like other Continental courts, the French tribunals have regarded the rules of customary international law as directly applicable whenever they are relevant to the adjudication of an issue of which they have jurisdiction, and concerning which there is no controlling legislative or executive act. They appear never to have doubted that they, as well as other organs of the French state, were obligated to apply the rules of international law in any appropriate case, although they have developed no coherent doctrine of ‘adoption’ or ‘incorporation’ as the basis of this obligation.”

296. The applicability of custom in French domestic law is still indirectly governed by the Preamble to the 1946 Constitution — the 1958 Constitution of the Fifth Republic contains a renvoi to the 1946 Constitution of the Fourth Republic. Cassese argues the fact that the new French Constitution lacks an explicit reference to customary international law is “eloquent evidence of the wide-spread skepticism and reserve about the contents, scope and impact of the traditional rules of international law”. However, the predominant doctrine in France seems to regard the reference of the Constitution of 1958 to the preamble of the Constitution of 1946 as a sufficient legal basis for applying international law.

(d) Germany

297. By contrast, the German approach to the incorporation of customary international law is set out in clear and unambiguous
terms in the Basic Law. Article 25 of the Basic Law not only recognizes custom but also elevates it to a superior status over municipal law:

“The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

On this basis, German domestic courts may take judicial notice of customary rules, as appropriate.

(e) Treaty making processes in civil law jurisdictions

298. European civil law jurisdictions generally recognize the precedence of incorporated treaties over national law. As a result, the constitutions of such States commonly provide for strict signature and ratification, including prior approval by the parliament.

299. In France, the power to negotiate and ratify treaties is constitutionally vested in the President of the Republic. However, the Constitution further requires that certain treaties “may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured.” The subject-matter of the treaties subject to this requirement is wide-ranging, and expressly includes: peace treaties; trade agreements; treaties or agreements relating to international organizations, committing the finances of the State, modifying provisions which are the preserve of statute law, relating to the status of persons, or those which involve the ceding, exchange or acquisition of territory. On this basis, the French process in respect of incorporation of most treaties might seem to reflect an essentially dualist rather than monist approach. However, although the required authorization takes the form of an Act of Parliament, it has no normative effect. That is, if the President ratifies a treaty without the required consent of the Parliament, the only sanction is political. The Conseil Constitutionnel has

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573. Article 52, Constitution of the Fifth Republic.
574. Article 53, Constitution of the Fifth Republic.
authority to determine that a treaty contains provisions contrary to the Constitution. Ratification of a treaty or agreement that is in conflict with the Constitution may only occur after the Constitution is amended.

300. Article 55 of the Constitution provides for the supremacy of treaties over French domestic law, in the following terms:

“Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

This Article thus expressly contemplates three separate requirements: (1) ratification or approval; (2) publication; and (3) reciprocity in application. A treaty that has not yet achieved publication in the Journal Officiel has no domestic legal effect in France, even if it has entered into force on the international plane. But once published, municipal courts will apply it as of the date it entered into force for France. The Conseil Constitutionnel has somewhat narrowed the scope of application of the requirement of “reciprocity”. For example, the Conseil held that the obligations provided for under the ICC Statute “apply to each of the State parties independently from conditions for their execution by other parties; that thus the reservation of reciprocity mentioned in Article 55 of the Constitution is not to be applied”.

301. In Germany, the treaty-making power of the executive is regulated by Article 59 (2) of the Basic Law, which states:

“Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require the consent or participation, in the form of a federal statute, of the
bodies competent in any specific case for such federal legislation.”

Thus, many treaties concluded by Germany require prior legislative ratification. The law approving ratification has the effect of making the treaty part of German law with effect from the date the treaty enters into force for Germany. The treaty may then be applied by German domestic courts as part of national law. However, unlike custom, treaty law is not superior to municipal law.

302. The task of ensuring uniformity in the application of general international law is entrusted to the Federal Constitutional Court of Germany, which has a particularly wide-ranging authority to ensure domestic compliance with public international law principles. In 2004, it held:

“the Federal Constitutional Court is also competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international law obligations and may give rise to international law responsibility on the part of Germany . . . In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law. For this reason, it may be necessary, deviating from the customary standard, to review the application and interpretation of international law treaties by the ordinary courts.”

F. Conclusions: A Return to Dédoublement Fonctionnel?

303. As we have seen, Scelle’s theory of the dédoublement fonctionnel fails at a general level for want of any mandate from international law to domestic organs, notably courts, requiring them to act as international agencies. When such a mandate is intended it is given explicitly, as in the criminal law field with the suppression conventions. Generally speaking international law demands from national agencies only the required result, leaving it up to those

586. Basic Law, Art. 100 (2).
agencies to achieve that result by such means as the national system wills, in accordance with its own constitutional requirements.

304. Indeed at a deeper level this is true even when such a general mandate is or would be given, whether at the international or regional level, as with the European Union. National judges are hardly more European than they are international; if they are either it is only contingently, though the contingency differs. With European as with international law, the Grundnorm (from the perspective of a national institution) is pacta sunt servanda, whereas for a national institution the Grundnorm comes from the constitution, or perhaps the national society whose constitution it is. For the European Union may falter or fail or be repudiated; just as treaties may be terminated. The primary rules are (it is hoped) the same and to be interpreted in the same way; but the secondary rules are different.

305. Among these secondary rules is the principle of equivalent protection, which manifests itself in the case-law concerning the implementation of Security Council resolutions within the European Union, which will be discussed further in Chapter XII. Perhaps the governing principle is the Bosphorus principle, after the leading case. In Bosphorus an apparent conflict arose between Ireland’s obligations under the European Convention on Human Rights (ECHR) and under EC law. The applicant claimed that its right to peaceful enjoyment of property — guaranteed by Article 1, Protocol One, to the ECHR — was breached when Irish authorities impounded its leased aircraft. Ireland argued that it could not provide the procedural guarantees required under its ECHR obligations when it acted pursuant to the EC community regulation, which itself implemented a Security Council resolution. The Court determined that despite appearances, no genuine conflict existed. Because the EC regulation in question was directly effective, Ireland was bound to implement its obligations. However, this did not abrogate European human rights obligations; there was a rebuttable presumption that Community law provides “equivalent” or “comparable” human rights pro-


tection to that of the ECHR; on this basis if Irish measures complied with EC standards, they would also comply with ECHR standards. Such a principle was first articulated in Solange in relation to possible breach by EC law of guarantees under the German Federal Constitution. The Federal Constitutional Court held that “so long as” the European Community did not have its own catalogue of fundamental rights, German courts reserved the right to examine the compatibility of EU law with the fundamental rights guaranteed by the German Constitution: national constitutions prevail unless equivalent standards can be met by a regional system, displacing any possible conflict. The two Kadi cases, discussed in Chapter XII, are to similar effect. Thus even for the purposes of dédoublement fonctionnel the European Union is not systematically integrated, although it is integrated pro tem. And the same principle must apply at the international level.

306. For a long time, it seemed that international lawyers could only count up to two: two sides to a treaty, two parties to a dispute. The great peace treaties of early modern Europe, despite involving a multiplicity of States, tended to allocate them to one or other “side”. Even today, what we think of as multilateral treaties often create networks of bilateral rights and obligations — subsisting between pairs of States — rather than obligations genuinely owed by or to multiple States. In this chapter we will consider to what extent international law has become truly multilateral. We will trace the development of multilateral norms in international law, particularly of multilateral treaties, from their prehistory, to the apparent breakthrough of 1815, to the aggregation of quasi-universal “law-making” treaties after 1945. A recent development meriting attention is the emergence of hierarchically superior categories of multilateral norms: peremptory norms and obligations *erga omnes*. This will lead to a discussion of an important practical consequence of multilateralism: which States may have standing to bring claims about matters of common or global concern.

A. Bilateral, Multilateral, Plurilateral\(^592\)

307. We begin with some definitions. The Vienna Convention on the Law of Treaties (VCLT) refers to “bilateral” and “multilateral” treaties without defining either word\(^593\). But there is no mystery about the meaning of the terms. “Bilateral”, which was always a
legal term, entered English in the late eighteenth century and French in the early nineteenth. It simply means two-sided: a bilateral treaty is hence one with two sides or parties. Since the VCLT contains separate termination provisions for bilateral and multilateral treaties that, together, are clearly meant to deal with all treaties, any treaty with more than two sides must logically be “multilateral”, meaning many-sided.

308. We might question these simple definitions. What if one “side” of a treaty is defined to consist of multiple legal persons? For example, under the Trusteeship Agreement for Nauru, three States — Australia, New Zealand and the United Kingdom — were designated as “the Administering Authority”. Australia relied on this provision in Certain Phosphate Lands in Nauru to argue that it did not have any independent obligations under the treaty. But the Court held, in effect, that since there was no suggestion that the Administering Authority was a separate legal person, the use of a collective designation to refer to the three States did not convert a multilateral treaty into a bilateral one. We can apply the same reasoning elsewhere. The Treaty of Guarantee in relation to Cyprus was concluded by Cyprus “of the one part” and Greece, Turkey and the United Kingdom “of the other part” and expressly reserved the

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595. Trusteeship Agreement for the Territory of Nauru, New York, 1 November 1947 (in force, 1 November 1947), 10 *UNTS* 3. As Art. 4 of the Agreement recorded, the three Governments had arranged that Australia would, unless otherwise agreed “continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory”.


power of the three guarantor States to act unilaterally. But the treaty still regulated the relations of those States as between each other. Thus, whatever terms a treaty uses for its parties, if it is between more than two legal persons then it is a multilateral treaty.

309. The term “plurilateral”, meaning several-sided, sometimes appears. This usually means a multilateral treaty to which only a limited number of States can be parties. The VCLT provides for a special rule of unanimous acceptance of reservations “[w]hen it appears from the limited number of the negotiating States and the object and purpose of a treaty” that that is an essential condition of consent. Seemingly, the object and purpose of a treaty can have this effect only if there is a limited number of negotiating States.

598. Nicosia, 16 August 1960 (in force, 16 August 1960), 382 UNTS 3. The first paragraph of Art. IV provides that the three guarantors should consult in the event of breach of the Treaty with a view to taking “measures necessary to ensure observance”. The second paragraph provides that if concerted action is not possible, “each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty”.

599. In the WTO “plurilateral” has a slightly different meaning. The Plurilateral Trade Agreements are those, included in Annex 4 of the WTO Agreement, which WTO member States may but need not become parties to. See Marrakesh Agreement establishing the World Trade Organization, Marrakesh, 15 April 1994 (in force, 1 January 1995), 1867 UNTS 3, Art. II (3) reads:

“The agreements and associated instruments included in Annex 4 (henceforth referred to as ‘Plurilateral Trade Agreements’) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.”

Annex 4 appears at 1869 UNTS 508.

600. VCLT, op. cit., Art. 20 (2).

601. The contrast between reservations to plurilateral treaties under Art. 20 (2) and reservations to multilateral treaties under Art. 20 (4) is a subtle one. VCLT, op. cit., Art. 19 (c), adopts the “object and purpose” test as a criterion for the permissibility of a particular reservation to any multilateral treaty. If one takes the view that Art. 19 lays down an objective test for the permissibility of a reservation (as distinct merely from articulating certain criteria for determining their opposability or non-opposability to other parties), then a reservation impermissible under Art. 19 (c) will preclude the reserving State from becoming, in truth, a party to the treaty. But if an impermissible reservation is actually accepted by all States parties to a multilateral treaty, it will be effective, since the States parties to a treaty may collectively dispense with its requirements. The difference is that whereas in Art. 19 (c) the “object and purpose” test is concerned to test the compatibility of a particular reservation with the treaty, in Art. 20 (2) the test is applied to the treaty as a whole, and is concerned with the question of whether any reservations at all may be accepted, whatever their content. This appears to be the real difference between the two categories of restricted (plurilateral) and multilateral treaty under VCLT, op. cit., Art. 20.
But beyond that special rule, plurilateralism is a matter of form or degree. Indeed, some plurilateral treaties, such as the European Convention on Human Rights\(^{602}\), may even have more parties than other multilateral treaties, such as the Vienna Convention on Succession of States with respect to Treaties\(^{603}\).

310. There is also an important distinction between norms and obligations\(^{604}\). Bilateral treaties (at least prima facie) create bilateral norms; multilateral treaties, multilateral norms. But a multilateral treaty may generate bilateral obligations — as many bilateral obligations as there are pairs of parties\(^{605}\). In this way, it has been argued that even the WTO is a conglomerate of bilateral obligations\(^{606}\). Or take the case of the right to innocent passage under the UN Convention on the Law of the Sea\(^{607}\). The right of State A’s ships to innocent passage through State B’s territorial sea may be a bilateral obligation, owed by State B to State A, even though it arises under a multilateral convention. This does not mean that other States parties, like State C, have no interest in compliance with obligations under a multilateral treaty; they do have an interest in general compliance with UNCLLOS. But equally it may not make much sense to say that State C has a “right” that State A’s ships should enjoy innocent passage through State’s B’s territorial sea. Why should State A not be free to qualify or forego its right as against State B in a certain case or generally? Just because State B’s obligation to State A under a multilateral treaty is the same as its obligations to other States parties does not necessarily make that obligation multilateral.

311. Some of the tensions between bilateralism and multilateral-

\(^{602}\) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (in force, 3 September 1953), 213 UNTS 221 (ECHR). It currently has 47 parties.

\(^{603}\) Vienna, 23 August 1978 (in force, 6 November 1996), 1946 UNTS 3. It currently has 22 parties.

\(^{604}\) As Roberto Ago said in defining authoritatively the scope of the ILC’s State Responsibility project: “it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation”: ILC Ybk 1970/II, p. 306, cited in the introductory commentary to ILC Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Ybk 2001/II (2).

\(^{605}\) A treaty between 4 States could generate 6 bilateral links; a treaty between all 193 UN member States could generate 18,528 bilateral links; a treaty between \(n\) States could generate \(n \times (n - 1) / 2\) bilateral links.


ism in the context of multilateral treaties also exist in customary international law. In both cases, specific international legal norms tend to prevail over more general norms. Thus in the Right of Passage case the International Court held that there may also be bilateral customary norms and that they will prevail over any general rule that could be derived from custom or general principles of law. The notions of opposability and the persistent objector can also be seen as restraining the emergence of general customary norms. And the express specific consent of States to treaties usually prevails over their general and implied consent to customary norms (and even more so over the other category of international legal norms identified in Article 38 (1) (c) of the Statute of the International Court — general principles of law). This primacy of more specific norms seems to undermine the possibility of genuine multilateral norms that are not dependent on the continued acceptance of individual States.

312. Indeed for the most part what we see are contingent multilateral norms: treaties that happen to be universal, customs that happen to be general, principles of such a high level of generality that no conscientious objection appears or is necessary. Specific and general norms relate to each other by way of interpretation, assent, practice and the operation of the lex specialis rule. One issue to consider in this chapter is the extent to which multilateral norms can exist in international law without being contingent in these respects.

B. Development of Multilateralism

1. Thinking multilaterally

313. We might see multilateral treaties — especially those agreed to at quasi-universal “law-making” conferences — as simply a more efficient way of generating bilateral relations. To some degree, this conclusion may be unavoidable in the absence of a vertical, centralized system for enacting international law. It is also historically sound, for it acknowledges the late historical emergence of multilateral treaties, which were unknown in early modern international law.

608. Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, ICJ Reports 1960. See Chap. X.
609. See Chap. II.
314. This is well illustrated by the Peace of Westphalia of 1648, which settled a major European conflict: the Thirty Years’ War between a mostly Protestant alliance on one side and the Holy Roman Empire plus various mostly Catholic allies on the other. At that time there were more than 150 semi-independent entities in Germany alone, under the aegis of the Empire, and not all on the same side. We should be careful in applying modern assumptions about statehood, legal personality and treaty-making to this very different period. Nonetheless, the wide-ranging settlement at Westphalia comprised three bilateral treaties: between the Netherlands and Spain; between Sweden and the Empire; and between France and the Empire. These treaties were expressed to have two “sides” — though the participants seem to have taken a relaxed view of representation. France and Sweden insisted during negotiations that all the German princes should sign separately, but in the event only 15 were added and Emperor Ferdinand III’s signature was treated as valid for all the princes. Equally, the Queen of Sweden represented “her Allies and Adherents”. Almost everyone was roped in to one “side” or the other in this way rather than signing as separate entities, with the result that the treaties took a bilateral form despite the multiplicity of warring States.

315. This pattern of pan-European treaty-making continued to be influential in the seventeenth and eighteenth centuries. The Peace of Utrecht in 1713-1715 was made up of no less than 11 treaties that adhered even more closely to a bilateral form than the Peace of


613. On the bilateral structure of the Westphalia treaties and their relationship to earlier treaty practice, see R. Lesaffer, “The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648” (1997) 18 Grotiana (New Series) 71. Lesaffer notes that third powers that were not signatories were not necessarily bound by the treaties in the same way as the parties, although the condition of peace established by the treaty was considered to include them; ibid., p. 83. See further R. Lesaffer, “Peace Treaties from Lodi to Westphalia”, in R. Lesaffer (ed.), Peace Treaties and International Law in European History: From the Late Middle Ages to World War One (Cambridge, CUP, 2004), p. 9, and other chapters in the same volume.
Westphalia. It must be noted, as Krystyna Marek has, that there existed some treaties plainly phrased in multilateral terms. The Treaty of Aix-la-Chapelle of 1748 included what can only be seen as a multilateral guarantee: “Toutes les Puissances contractantes et intéressées au présent Traité, en garantissent réciproquement et respectivement l’exécution.” But our predominant impression from the period is that the notion of multilateral treaties was slow to develop. Vattel, for instance, does not evince much interest in the question; in his view, the contents of treaties were mere matters of fact or history, not law. And this view was evidently influential. Anthony Carty writes:

“the growing influence of Vattel in the early nineteenth century was to have the very curious effect of directing lawyers’ attention away from treaty issues as they were understood by nineteenth century statesmen, without offering a radical new approach to the issue of State necessity. That issue tended to be submerged in Vattel’s wider theoretical approach to law, [which] consisted of a theory of natural rights — or legal powers/capacities, to be more exact — which included the right to acquire property and to conclude contracts, but did not provide any resolution of the difficulty that, at the international level, States were free and equal, without any sovereign

614. France-Great Britain, 11 April 1713, 27 CTS 475; France-Netherlands, 11 April 1713, 28 CTS 37; France-Savoy, 11 April 1713, 28 CTS 123; France-Prussia, 11 April 1713, 28 CTS 141; France-Portugal, 28 CTS 169; Spain-Savoy, 13 July 1713, 28 CTS 269; Spain-Great Britain, 13 July 1713, 28 CTS 295; Spain-Netherlands, 26 June 1714, 29 CTS 97; Empire and Spain-France, Rastadt, 6 March 1714, 29 CTS 1; Empire and Spain-France, Baden, 7 September 1714, 29 CTS 141; Spain-Portugal, 6 February 1715, 29 CTS 201. On the Treaty of Utrecht see Osiander, op. cit., pp. 90-165.


616. 38 CTS 297, Art. XXIII. Translation: “All the Powers contracting and interested in the present Treaty guarantee reciprocally and respectively its execution.” Marek’s thesis that real multilateral treaties existed well before the Congress of Vienna is supported by the series of treaties constituting the Swiss Confederation and dating back to 1215. This culminated in Act XI of the Congress of Vienna, the Declaration respecting the Affairs of the Swiss Confederation, Vienna, 20 March 1815, 64 CTS 5. The Declaration, to which Switzerland acceded on 27 May 1815, recognized the neutrality and territorial integrity of the Swiss Confederation and regulated various inter-cantonal issues.

authority to judge their actions, including the extent of their treaty obligations. There was no international civil society.”\textsuperscript{618}

316. All this is not to suggest that international law, in its “original” incarnation, was simply a network of bilateral relations. That was true of treaties between some or even many States. But customary international law, under the influence of natural law theories such as Vattel’s, was different. We might almost say (at some risk of oversimplification) that in the classical period customary international law was assumed to be general, if not universal, not so much a network as a field of action, a common ground — whereas treaties were merely in the nature of particular contracts concluded against that background.

317. There is, however, no \textit{a priori} reason why treaty rights and obligations should always be bilateral. There may be policies or outcomes in which States have a common interest without having any special or distinctive interests of their own. Whether we conceive of responsibility in such cases as being bilateral or multilateral, as separate or solidary, can have a range of practical consequences. Must, for example, two States that hold a right jointly act together in vindicating it? Distinguishing truly multilateral obligations from mere bundles of bilateral relations also affects how we think about the international legal system. It is thus no surprise that the emergence and later development of multilateral treaties has coincided historically with attempts to establish overarching regimes for ordering international society, such as the Concert of Europe and the United Nations Charter.

318. The major shift is usually dated to 1815. Although (contrary to the conventional view) the Congress of Vienna between Austria, France, Prussia, Russia and Great Britain was not the first multilateral treaty, it includes three novel annexes framed in general terms\textsuperscript{619}. Act XVII was a Règlement on the Precedence of Diplomatic Agents that applied to all diplomatic agents and adopted a principle of equality among agents in each of several

\textsuperscript{618} A. Carty, \textit{The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs} (Manchester, Manchester UP, 1986), p. 68.

\textsuperscript{619} Definitive Treaty of Peace between Austria, Great Britain, Prussia and Russia, and France, 20 November 1815, 65 CTS 251. A series of instruments was annexed.
classes. Act XVI related to navigation on international rivers and included, as well as articles on specific rivers, some general articles binding “les Puissances dont les Etats sont séparés ou traversés par une même rivière navigable” (i.e. only the signatory powers).

And Act XV was a Declaration relative to the Universal Abolition of the Slave Trade, “une déclaration solennelle des principes” made “à la face de l’Europe”, which was not subject to ratification or accession. Its sentiments were splendidly progressive, though it was little more than a record of a failure to agree: the slave trade was not abolished until much later, and the main multilateral instrument dates from 1926.

Despite these equivocations and the fact that the former two Acts purported to bind only the contracting powers, the Acts embodied certain general regulations that were multilateral in substance as well as form and that went on to become part of the corpus juris.

The evident success of the Congress tended to support the view that it had established a new European order through multilateral process and through the establishment of general principles, rather than just a bundle of bilateral bargains. Friedrich von Gentz of Prussia wrote in 1818:

“The whole of the European powers have since 1813 been united, not by an alliance properly so called, but by a system of cohesion founded on generally recognised principles, and on

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620. 64 CTS 1. The Règlement was concluded at Vienna on 19 March 1815 between Austria, France, the United Kingdom, Portugal, Prussia, Russia, Spain and Sweden. It was modified by a Protocol of 21 November 1818, 69 CTS 385. It is now reflected in Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961 (in force, 19 March 1967), 500 UNTS 95, Arts. 14-18. See ILC Ybk 1956/II, pp. 132-134.

621. Règlement for the Free Navigation of Rivers, Vienna, 24 March 1815, 64 CTS 13, Art. I. The term “états” is used in its original sense, which was closer to a landed “estate” than to the notion of sovereignty.

622. The declarants were Austria, France, the United Kingdom, Portugal, Prussia, Russia, Spain and Sweden. See 63 CTS 473.

623. It was not until 1841 that a multilateral treaty was concluded on the subject: Treaty for the Suppression of the African Slave Trade (Austria, United Kingdom, Prussia and Russia), 20 December 1841, 92 CTS 437. France signed but did not ratify the Treaty. A treaty in an “all States” form had to wait until 1926: Slavery Convention, Geneva, 25 September 1926 (in force, 9 March 1927), 60 LNTS 253. Despite its importance, the General Act of the Brussels Conference relating to the African Slave Trade, Brussels, 2 July 1890, 173 CTS 293, is not in an “all States” form and dealt only with one region.
treaties in which every State, great or small, has found its proper place . . .” 624

320. It was this European system that found common currency around the world in the twentieth century. By 1868, when a multilateral treaty established the first public international organization, the International Telegraphic Bureau (later the International Telegraphic Union), essentially all the techniques of multilateral law-making had been developed625. A further advance was the Court’s Reparation Advisory Opinion, which established not only that international organizations had legal personality, including the capacity to bring claims against States on their own behalf or on behalf of their agents, but also that it was opposable to non-member States626. We will look at what some see as the culmination of this process in Chapter XIV on the “constitutionalization” of international law.

2. A residual bilateralism?

321. What we find after 1945 is almost a reversal of the approach of classical international law. Due partly to the declining influence of natural law theories, customary international law risked dissolving into a network of particular relations. In contrast, the most visible and far-reaching multilateral relations are now to be found in the great multilateral “law-making” treaties, whether they deal with international organizations, international peace and security, the law of the sea, world trade, human rights or the environment. This historical process must in itself be accounted a major step towards multilateralism. But multilateral treaties may serve simply as a convenient vehicle for the creation of new bilateral obligations. So we still need to consider to what extent the emergence of these multilateral treaties has resulted in multilateral obligations.

322. This depends partly on the integrity of the text — whether, under the law of treaties, multilateral obligations can be laid down

624. Cited by Osiander, op. cit., pp. 248-249. See also pp. 186-187 for a catalogue of similar descriptions by, among others, Castlereagh, Nesselrode and Talleyrand.
626. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 185. The International Court’s findings in this case on the international legal personality of international organizations are discussed in detail in Chap. VI (para. 246).
for all parties without fear of derogation, either from the beginning or subsequently. That would seem to be a necessary prerequisite for the existence of multilateral obligations. The answer seems simple enough. If States parties wish the text of a multilateral treaty to be integral, they can say so expressly. They can exclude reservations at the point of entry to the treaty and insist that the exclusion cannot be evaded by such devices as interpretative declarations. Or they can also exclude the possibility of subsequent variation *inter se* by only some States parties. In short they can create more-or-less self-contained mandatory regimes. An example of a treaty regime that is widely considered to be self-contained is that of the European Union. In some treaties, such as the “single undertaking” of the World Trade Organization, UNCLOS and the Rome Statute for the International Criminal Court, clauses have been inserted prohibiting reservations and insisting on the integrity of the negotiated text. But despite this possibility, it is still of practical importance what the default rule is that determines how far States are limited in making reservations to multilateral treaties.

323. Between the World Wars, the League of Nations depository practice was to decline to accept reservations not specifically allowed by the treaty text on the basis that that was what the negotiating parties must have intended. But in the *Reservations* case, a narrow majority of the International Court adopted the more liberal practice of Latin American States: to subject reservations only to the protean limitation that they not be “inconsistent with the object and purpose of the treaty”. This is as clear a policy decision as the Court has ever made. It appears that the majority preferred treaties of variable content but more States parties to integral treaties with (presumably) fewer States parties. It held that the object and purpose

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627. See, e.g., T. C. Hartley, “International Law and the Law of the European Union — A Reassessment” (2001) 72 BYIL 1-35. For further discussion on self-contained regimes, see Chap. IX.


630. On reservations to multilateral treaties see the successive reports of the ILC’s Special Rapporteur (Alain Pellet), summarized at <http://untreaty.un.org/ilc/summaries/1_8.htm> accessed 24 June 2013.

of the Genocide Convention implied “that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate” and that the complete exclusion of some States “would detract from the authority of the moral and humanitarian principles which are its basis” 632. Despite this, it is clear that, in the Court’s view, at a certain point it was a question for objective determination whether a particular reservation could be made — whether it was consistent with the object and purpose of the treaty — and what consequences that would have for the reserving State. The rule illustrates how multilateral concepts and regimes have been overlaid on the bilateral foundations of traditional international law.

324. Against the majority view permitting reservations, it could be argued — as the travaux préparatoires indicated — that the Genocide Convention dealt “with the preservation of an element of international order” and therefore that reservations of a general scope, at least, had no place in it 633. Judge Alvarez, in dissent, described such treaties, “reflecting the new orientation of the legal conscience of the nations”, as “almost real international laws” to which reservations could not be made 634. Considerations such as these influenced countervailing attempts to introduce special categories of multilateral norms into international law.

C. Special Categories of Multilateral Norms

325. These attempts have challenged the traditional view that there can be only contingent multilateral obligations. One of them, the notion of international crimes of State, was considered but ultimately not adopted in the Articles on the Responsibility of States for Internationally Wrongful Acts 635. But two other categories are now firmly established: first, obligations owed to the international community as a whole (also called obligations erga omnes or com-

munitarian norms); and secondly, peremptory (or *jus cogens*) norms. Some have criticized these categories for producing an ill-digested mass of “relative normativity”.\(^{636}\) Certainly, they remain poorly articulated, and the differences and relationships between communitarian and peremptory norms are unclear. But if these categories mean anything at all, they involve the introduction of decidedly multilateral elements that are not restrained by such contingencies as requiring States to become parties to integral multilateral treaties. They appear to operate hierarchically, or “vertically”, in contrast to the apparent flatness of traditional sources of international law, which seem to create only “horizontal” and bilateral relationships between States.

326. The differentiation of these new categories occurred later than the emergence of multilateral treaties and the recognition of the objective personality of international organizations. Unlike those other developments, it occurred largely outside the realm of State practice — through actions and reactions by the International Court and the ILC and, to a lesser extent, scholars.

327. At the time the ILC was finalizing the text of the VCLT, in the mid-1960s, there was a great struggle in the Court over the proceedings brought by Ethiopia and Liberia claiming breaches of South Africa’s League of Nations mandate for South West Africa (now Namibia). In 1962, the Court upheld jurisdiction 8 to 7, but in 1966 it effectively reversed itself on the casting vote of the then President, Sir Percy Spender.\(^{637}\) It held that the principle of “sacred trust” had no residual juridical content that could give rise to legal rights and obligations “outside the system as a whole” concerning a particular mandate:

“Once the expression to be given to an idea has been accepted in the form of a particular régime or system, its legal incidents are those of the régime or system. It is not permissible to import new ones by a process of appeal to the originat-

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ing idea — a process that would, *ex hypothesi*, have no natural limit. Hence, although . . . the members of the League had an interest in seeing that the obligations entailed by the mandates system were respected, this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs, and not individually.”

328. Ethiopia and Liberia could thus not invoke the compromissory clause in the mandate. Politically, this caused an outcry; legally, it seemed to presage a narrow view of the range and effect of international law in matters of public interest, if not an actual rejection of the possibility of multilateral rights and obligations. The majority was not categorical on the point (its leading light, Judge Fitzmaurice, was too good a lawyer for that). But the tone of the decision tended to contradict the 1962 decision, since if the claimants could not invoke the compromissory clause then there was no jurisdiction. Not only that, it also contradicted the approach to the “sacred trust” that the Court had taken in earlier advisory opinions on South West Africa, and it was hostile to multilateralism generally.

329. The Court’s decision in *Barcelona Traction* a few years later, in 1970, is often seen as a sort of apology for *South West Africa*. What had happened in between the two decisions was the adoption of the VCLT, by a majority of 79 to 1 (France) with 19 abstentions. The most controversial question at Vienna had been that of peremptory norms (the idea of which, incidentally, owed not a little to Fitzmaurice, who, as Special Rapporteur, noted the distinction between “*jus dispositivum*” and “*jus cogens*”). Under the final text of the VCLT, a treaty is void if it conflicts with a peremptory norm of general international law; and, exceptionally, there is provision for the settlement of disputes about peremptory norms.

638. *South West Africa*, op. cit., p. 35 (para. 54).
641. VCLT, *op. cit.*, Arts. 53, 64, 66 (a).
330. In Barcelona Traction, the Court avoided the term “peremptory norms” — to have used it a mere year after the adoption of the VCLT, when its entry into force could not be assumed, was evidently a leap too far. Instead of that leap, we got a new concept: “obligations of a State towards the international community as a whole . . . obligations erga omnes”\textsuperscript{642}. It was a confusing addition, since the examples the Court gave of obligations erga omnes were more or less the same as the typical examples of peremptory norms: obligations derived “from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”\textsuperscript{643}. Most of these examples had also been listed by the ILC in its commentary to Article 53 of the VCLT\textsuperscript{644}.

331. Indeed it is not too much to say that the terminology in this area is an unresolved shambles\textsuperscript{645}. There is even confusion between the idea of rights erga omnes and obligations erga omnes, as if international law has not always had a concept of status relative to the international community as a whole (for example, in the institution of territorial sovereignty) or as if the general notion of a legal right is explicated by the addition of Latin words. The Court has referred to a public statement by the French President as having been made “erga omnes”\textsuperscript{646}: for all the clarification this affords it might as well have said “urbi et orbi”\textsuperscript{647}. For a long time the Court itself continued to avoid the term “peremptory norm” (except when describing arguments made by the parties) and preferred synonyms. In Nuclear Weapons, for instance, it described the basic rules of humanitarian law as “intrangressible”\textsuperscript{648}. Since such rules are, regrettably, often

\textsuperscript{643.} Ibid., p. 32 (para. 34).
\textsuperscript{644.} ILC Ybk 1966/II, p. 248.
\textsuperscript{645.} See the comments by C. Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge, CUP, 2005), pp. 101-102.
\textsuperscript{646.} Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Request for the Indication of Provisional Measures, Order, ICJ Reports 1995, p. 305 (para. 61). The Court held that the statement, whether made erga omnes or not, could not be invoked by New Zealand.
\textsuperscript{647.} “To the city [of Rome] and to the world” — denoting certain papal addresses.
\textsuperscript{648.} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 257 (para. 79).
transgressed, the Court presumably meant that they were peremptory without wanting to say so.

332. The concept of peremptory norms finally made its Court debut — 36 years after that of “erga omnes” — in Democratic Republic of the Congo v. Rwanda in 2008. The DRC argued that Rwanda’s express reservation to the Court’s jurisdiction under the Genocide Convention was invalid because it prevented the Court from adjudicating claims of genocide. While agreeing with the result reached by the majority, which referred to jus cogens norms, Judge Dugard commented in a separate opinion:

“This is the first occasion on which the International Court of Justice has given its support to the notion of jus cogens. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation erga omnes, which together with jus cogens affirms the normative hierarchy of international law. Indeed, the Court itself initiated the notion of obligation erga omnes in 1970 . . .

The approval given to jus cogens by the Court in the present Judgment is to be welcomed. However, the Judgment stresses that the scope of jus cogens is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law.” 649

333. The majority of the Court affirmed that the mere fact that obligations erga omnes or peremptory norms are at issue “cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties” 650.

334. A desirable, but unlikely, consequence of the Court’s recognition of the category of “peremptory norms” would be for us to abandon the term “erga omnes” altogether. Since that outcome is not likely, we might consider the following to be the distinction, albeit provisional, between the two concepts. The historically older concept is that of peremptory norms, prohibitions so fundamental that two or several States cannot derogate from them, not even by treaty between themselves. The peremptory character of such norms attaches to the substance of the protected interest: the norm itself is

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650. Ibid., pp. 51-52 (para. 125).
superior to all treaties (unless the treaty reflects the will of the inter-
national community as a whole to modify the norm)\(^{651}\). By contrast
with the substantive impact of peremptory norms, obligations \textit{erga omnes} are concerned with who may complain of a violation, i.e. with standing.

\textbf{D. Standing}

1. \textit{An actio popularis?}

335. We have already seen that the Court rejected a notion of “public interest standing” in \textit{South West Africa}. Ethiopia and Liberia, the applicants, had not suffered direct injury due to South Africa’s practice of apartheid in South West Africa, and the Court considered that they lacked standing to claim on behalf of the people of South West Africa. In \textit{Barcelona Traction}, Belgium complained of a vi-o-
lation of the rights of a company that was Belgian-owned but incor-
porated in Canada. Under traditional conceptions of diplomatic
protection, protecting a Canadian company is a matter held in right of Canada, not Belgium or any other State. But the Court held that obligations \textit{erga omnes} would take the matter outside the purely interstate realm of diplomatic protection\(^{652}\). The dominant element is the universality of the interest in complying with such obligations and thus, by extension, the standing of all States to claim non-com-
pliance, whether or not they have suffered any actual harm from the breach. But no question of public right or interest was actually involved in \textit{Barcelona Traction} on the facts. Obligations \textit{erga omnes} can be provisionally defined as multilateral rights and obligations, established in the interest of and owed to the international commu-
nity as a whole, entailing a recognized legal interest of each of its members to invoke compliance. But in introducing this new concept, the Court also introduced new uncertainties. After distinguishing obligations \textit{erga omnes} from obligations derived from diplomatic protection, it went on to say:

“With regard more particularly to human rights . . . it should be noted that these also include protection against denial of jus-

\(^{651}\) The possibility of such modifications is envisaged by VCLT, \textit{op. cit.}, Art. 64.

tice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim."

336. To start with, the contrast drawn here between instruments “on the universal level” and the European Convention is difficult to accept. The relevant provision of the International Covenant on Civil and Political Rights (Article 41) is not limited by considerations of the nationality of claims, any more than Article 48 (b) of the European Convention then was.

337. More significantly, it is not clear how this is to be reconciled with the Court’s view that obligations erga omnes are the concern of all States “[b]y their very nature” and that hence “all States can be held to have a legal interest in their protection”. The Court even gave the example of “the principles and rules concerning the basic rights of the human person”. One possibility is that in giving that example, it was limiting itself to those “principles and rules” that were clearly recognized by general international law as obligations erga omnes in 1970. This was arguably true for the prohibitions of slavery and racial discrimination but not for the guarantee against denial of justice. On this view, only some aspects of human rights law give rise to obligations erga omnes (or at least, only some then


654. It is true that ECHR, op. cit., Art. 48 (b), specifically envisaged cases being brought to the European Court of Human Rights by a party “whose national is alleged to be the victim”. But this was not an exclusive provision, and if the drafters of the International Covenant had wished to insert a similar proviso they could have easily done so. The issue addressed by Art. 48 (b) does not now arise under the ECHR as amended by Protocol 11 (in force, 1 November 1998), ETS No. 155.

did so). A second possibility is that the Court envisaged the existence of obligations *erga omnes* but without States necessarily having any of the “corresponding rights of protection” that it noted had “entered into the body of general international law”. This might suggest that existing conditions of admissibility of claims (including the nationality of claims) would continue to apply to breaches of communitarian norms. This view deprived the Court’s recognition of the new category of much of its significance.

338. Perhaps a more reasonable interpretation is that the Court was seeking to distinguish between the remedies available for diplomatic protection claims and for claims brought within the framework of human rights. On that basis, the possibility that general international law recognized an obligation not to deny justice to persons before national courts (even an obligation *erga omnes*) would not produce the result of assimilating the two fields. Nor would it equate the remedies available to concerned States for breaches of human rights with those available to States whose own rights had been infringed by a denial of justice to their nationals. But whichever view is preferred, uncertainties of interpretation remained, and the result is that *Barcelona Traction* was only the beginning of the story.656

2. Articles on State Responsibility657

339. It is now generally accepted that in certain circumstances any State has standing to protest against breaches of fundamental norms, and if necessary to institute proceedings to vindicate its interest as a member of the international community. The most significant attempt to articulate what those circumstances are is Article 48 of the Articles on State Responsibility. It provides that “[a]ny State other than an injured State is entitled to invoke the responsibility of another State” in two cases. First, if the obligation breached is either owed “to a group of States including that State, and is established for the protection of a collective interest of the group”. This category comprises what are sometimes called obligations *erga omnes partes*. Secondly, if the obligation is owed “to the international community

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656. See, e.g., Tams, *op. cit.*, pp. 48-96.  
657. See further Crawford, *State Responsibility, op. cit.*, Chap. 11, from which this section is partly drawn.
as a whole”: i.e. general obligations *erga omnes*. Note the difference from Article 53 of the VCLT, which describes peremptory norms as “a norm accepted and recognized by the international community of States as a whole”. In practice both terms are used, and the broader one is this time more accurate: the European Union, for example, is not a State but it is a full contributor to the making of international law and must certainly be counted part of any “international community”.

340. Article 48 represents a genuine break from the older view, expressed by the Court in the *Reparation* Opinion, that “only the party to whom an international obligation is due can bring a claim in respect of its breach”\(^{658}\). That approach would work well enough if international law consisted of bilateral norms — which, as we have seen, it did almost entirely until fairly recent times — but it is nonsensical if the “party” to which the obligation is owed is a collective one without the capacity to act. And it would be extravagant to adopt the method of the early modern treaties we discussed earlier and treat obligations in areas such as international environmental and human rights law as being owed individually to each State. Instead, every State has standing (or in the case of obligations *erga omnes partes*, every State belonging to the group of States parties).

341. Article 48 was not adopted without criticism. Some States expressed concern about its breadth and the danger of “opening the flood gates” of litigation\(^{659}\); some scholars\(^{660}\) complained that it was too weak compared with the rejected notion of international crimes of State. So far there is nothing to substantiate these contrasting fears. States do not seem inclined to bring international legal proceedings without good reason; but if they do bring them, acting (or purporting to act) in the common interest of the international community, they should not be hindered by procedural technicalities or left with only with non-judicial means of dispute settlement.

342. The question came before the Court in 2012 in *Belgium v. Senegal*. Hissène Habré, the former president of Chad, had been

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accused of torture and crimes against humanity but had been granted asylum in Senegal. In 2005, Belgium sought his extradition in reliance on the Convention against Torture, and five years later it commenced proceedings against Senegal. Senegal argued that the claim was inadmissible because none of the torture victims had Belgian nationality at the time of the alleged offences. Belgium relied, among other things, on another provision of the Articles on State Responsibility: Article 42 (b) (i), which entitles a State to invoke responsibility “as an injured State” where the obligation is owed to “a group of States including that State, or the international community as a whole” but also requires that the breach “specially affects that State.” Belgium claimed to be specially affected by reason of the Belgian proceedings and the extradition request. The Court declined to decide the case on that narrower ground. Instead it held that the relevant provisions of the Convention against Torture were “obligations erga omnes partes’ in the sense that each State party has an interest in compliance with them in any given case.

It concluded:

“The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.”

661. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 (in force, 26 June 1987), 1465 UNTS 85.
662. Emphasis added.
663. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment, International Court of Justice, 20 July 2012, p. 26 (para. 68).
664. Ibid., p. 26 (para. 69). See also p. 6 (para. 23) (Judge Owada, sep. op.); pp. 3-4 (paras. 21-23) (Judge Skotnikov, sep. op.); and cf. pp. 3-4 (paras. 11-18) (Judge Xue, diss. op.).
343. Although the Court did not actually refer to Article 48, the decision is firmly in line with it. Its use of the term *erga omnes partes* is significant, suggesting that it may be more parsimonious with *erga omnes* obligations in future. Australia’s claim against Japan in *Whaling in the Antarctic*, in which it invokes an obligation *erga omnes partes* under the International Convention for the Regulation of Whaling, may present it with another opportunity to consider the evolving law in this area.

E. Conclusion

344. The concepts of peremptory and communitarian norms represent a major step towards multilateralism. But they are also just the latest step on a path that international law has been following since at least 1815 and arguably even before then: away from pure bilateralism and towards a system combining both bilateral and multilateral norms, including norms articulated through mass “law-making” treaties. In the primacy of the specific over the general (except in the case of *jus cogens* norms) and the system of reservations to multilateral treaties, there is still a residual bilateralism in international law. But even this is changing. In the next two chapters — on the proliferation of regimes and on universality — we will explore some of the tensions between bilateralism and multilateralism that continue to shape international law.

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665. The Court held that the dispute was exclusively one under the Torture Convention and not under general international law: *Questions relating to the Obligation to Prosecute or Extradite*, op. cit., p. 23 (para. 55).

CHAPTER IX

FRAGMENTATION, PROLIFERATION AND “SELF-CONTAINED REGIMES”

“Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world . . .”

Yeats, The Second Coming (1919)667.

“At one point midway on our path in life
I came around and found myself now searching
through a dark wood, the right way blurred and lost.”

Dante, Inferno (c. 1321)668.

A. The Problem

1. A case study: Hirsi Jamaa v. Italy

345. In Hirsi Jamaa v. Italy669, the Grand Chamber of the European Court of Human Rights was faced with a claim by Somali and Eritrean asylum seekers, part of a group of about 200 who attempted to cross by boat from Libya to Italy. While still on the high seas, they were intercepted by the Italian authorities, transferred to Italian military vessels, and returned to Tripoli. The Italian Minister of the Interior relied on a series of bilateral agreements with Libya, entered into pursuant to an Italian policy to curb clandestine immigration.

346. The asylum seekers alleged that their treatment was inconsistent with various provisions of the European Convention on Human Rights670. In particular, the Grand Chamber found that Italy
had breached ECHR Article 3, on the basis that by returning the asylum seekers to Libya without any form of individual assessment, Italy knowingly exposed the asylum seekers to inhuman and degrading treatment. Most notably, the Grand Chamber found that “[i]rregular immigrants, such as the applicants, were destined to occupy a marginal and isolated position in Libyan society, rendering them extremely vulnerable to xenophobic and racist acts.” It was further held that Italy had breached ECHR Article 3 by exposing the asylum seekers to the risk of arbitrary repatriation.

347. So far, so arguable. But the applicants in Hirsi Jamaa made a further submission on the basis of Article 4 of Protocol 4, which provides that “[t]he collective expulsion of aliens is prohibited”. The plain meaning of that provision — and particularly the word “expulsion” — would suggest that in order to be “expelled” from somewhere, one must first be “in” the place that one is being expelled from. One has to be expelled from somewhere, whether the Garden of Eden or Uganda. It is difficult to see how someone could be expelled from the high seas.

348. This reading is consistent with the drafting history. Article 4 was a latecomer to Protocol 4; it only emerged after the Assembly’s first draft was submitted to the Committee of Experts.

672. Ibid., para. 125.
673. Ibid., para. 158.

“Expulsion, n. The action of expelling; the fact or condition of being expelled.

Expel, v.t.
1. Eject; cause to depart or emerge; esp. by the use of force; banish from a place; discharge (a bullet).
2. Compel the departure (of a person) from a society, community, etc.; esp. enforce the departure (of a student) from an educational establishment as a punitive measure.
3. Reject from attention or consideration.
4. Keep off, exclude, keep out (rare).”

This much longer draft contained a territorial limitation: expulsion could only occur where the expellee was “in the territory of a Contracting Party”. This version of Article 4, moreover, was based on Article 13 of the International Covenant on Civil and Political Rights, a procedural guarantee concerning expulsion which also contains a territorial limitation. Removal of the limitation does not mean that the drafters intended that the provision be territorially unlimited. Nowhere in the Committee of Experts’ deliberations does there appear any intention to create a territorially unlimited prohibition.

349. The Grand Chamber relied on Article 1 of the ECHR, which provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. ECHR Article 1 jurisdiction is presumed to be “essentially territorial”; but it can apply in circumstances where a State exercises effective control of an area outside of its territory, e.g. in the case of a military operation. In Hirsi Jamaa, the Grand Chamber found that Italy’s exclusive control over the intercepting military vessels justified the extension of ECHR Article 1 juris-

677. Explanatory Report to Protocol No. 4, op. cit., para. 30 provided:

1. An alien lawfully residing in the territory of a High Contracting Party may be expelled only if he endangers national security or offends against ‘ordre public’ or morality.

2. Except where imperative considerations of national security otherwise require, an alien who has been lawfully residing for more than two years in the territory of a Contracting Party shall not be expelled without first being allowed to avail himself of an effective remedy before a national authority, within the meaning of Article 13 of the Convention.

3. An alien who has been lawfully residing for more than ten years in the territory of a Contracting Party may be expelled only for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of particularly serious nature.”

678. Ibid.


681. Ibid., 505-506.


This is all well and good — indeed, a similar conclusion was reached with respect to maritime interception in the case of *Medvedyev v. France*. But the point was not the meaning of Article 1, it was the meaning of Article 4. The Chamber went on to argue that the concept of extraterritorial jurisdiction in ECHR, Article 1, should be used to expand the scope of Article 4 of Protocol 4 on the basis that:

“[t]o conclude otherwise . . . would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No 4, which would go against the principle that the Convention must be interpreted as a whole.”

This reasoning is specious: one struggles to see how the meaning of the term “jurisdiction” in ECHR Article 1 can control the meaning of the term “expulsion” in Article 4 of Protocol 4. The Grand Chamber was no doubt correct to say that Article 4 applies in situations falling within the jurisdiction in the sense of Article 1. But that does not mean that the substantive elements of Article 4 do not need to be made out.

350. The conclusion is at odds with other important norms of international law, notwithstanding the Grand Chamber’s unconvincing assertion that its ruling did not compromise a State’s ability to set its own immigration policy. Of course it did. In principle, a State has the right to determine who shall enter its territory, subject to a few legal restrictions. Among these, collective expulsion of aliens is a serious breach of international law, and Article 4 is expressed as an absolute and non-derogable prohibition. As such, it must be interpreted narrowly and precisely. If any measure prevent-

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684. *Hirsi Jamaa & Others*, op. cit., paras. 76-82.
687. *Ibid.*, para.179: “The above considerations do not call into question the right of States to establish their own immigration policies. It must be pointed out, however, that problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State’s obligations.”
688. This was perhaps amongst the earliest and widely recognized powers of sovereignty, and was recognized in England as a prerogative power of the Crown as early as the seventeenth century: *East India Co v. Sandys*, (1684) 10 ST 371, 530-531 (Jeffreys CJ). See further *R (European Roma Rights Centre & Others)* v. *Immigration Officer at Prague Airport*, [2005] 2 AC 1, 27-28 (Lord Bingham).
ing groups of aliens from entering the territory of a Contracting State is prohibited, then the words of Article 4 cease to have meaning. For example, in the “Eurotunnel” decision, at the request of cross-Channel train operators, an arbitral tribunal found that it was incumbent on the United Kingdom and France “to maintain conditions of of normal security and public order” to prevent asylum seekers from illegally boarding trains travelling from France to the United Kingdom. Under the Grand Chamber’s decision, it would appear that this would be equivalent to collective expulsion.

351. The decision, moreover, ignores the purpose served by the principle of non-refoulement that is expressed in the Refugee Convention. Article 33 (1) of the Convention prohibits the expulsion or return (refoulement) of refugees “to the frontiers of territories where his life or freedom would be threatened” on account of racial, ethnic or religious factors. The generally accepted position is that the non-admittance of a refugee must occur from within or at the very least at the frontier of the State refusing entry. For the scope of Article 4 to expand so as to cover as preventive measures taken outside the territory of the State would render Article 33 (1) of the Refugee Convention redundant as far as groups of persons are concerned and would do so irrespective of the treatment to be expected in the State of return: there would no longer be any requirement of a well-founded fear of persecution.

352. Hirsi Jamaa is also at odds with the International Law Commission’s (ILC) work on expulsion. Draft Article 2 (a) of the Commission’s proposed Draft Articles on the Expulsion of Aliens provides that “expulsion” means “a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State”. As the Special

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692. Draft Arts. 1-32 were provisionally adopted on first reading by the ILC’s Drafting Committee at its 64th session in 2012. See UN doc. A/CN.4/L.797, 24 May 2012 (emphasis added).
Rapporteur noted, expulsion “refers to the displacement of an individual under constraint beyond the territorial frontier of the expelling State to a State of destination” 693.

353. Finally, the decision is at odds with the decision of other courts or tribunals at a domestic level. The House of Lords in the Roma Rights case had to consider whether the United Kingdom’s policy of intensively questioning Roma passengers prior to boarding at Prague airport (pursuant to an agreement with the Czech Government) was contrary to the Refugee Convention. Following an extensive analysis of the Convention, the ECHR and customary international law, the House concluded that there was no obligation on the part of the United Kingdom to extend legal protections of the relevant kind to asylum seekers in situations that did not arise at or within its frontiers 694.

2. Defining fragmentation

354. In short the Grand Chamber in Hirsi Jamaa laid down the “law” on collective expulsion without due regard to the relationship of Article 4 of ECHR Protocol 4, with other rules of international law. It employed textual and teleological reasoning to reach a predetermined result. Other international courts and tribunals, notably the International Court, would be most unlikely to reach the same conclusion. But the issue may never come before the International Court. Under the ECHR, there is no right of appeal to another court or tribunal. There is no avenue for the correction of the decision, especially where it is a unanimous decision of a Grand Chamber. As was observed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in Tadić:


“There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear. But that principle, even if one of customary international law, cannot avail the appellants, who have not left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom.”
“International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).” 695

355. In this light, the decision in *Hirsi Jamaa* typifies the problem caused by the proliferation of international courts and tribunals, and the consequent “fragmentation” of international law. In short, fragmentation is the product of a system of laws that, by and large, lacks a sense of vertical integration, of hierarchy.

356. The issue was addressed by the ILC Study Group under the chairmanship of Martti Koskenniemi 696. This recognized that:

“[S]pecialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining field and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly the loss of an overall perspective on the law.” 697

Put more pithily by Sir Robert Jennings, fragmentation reflects a concern that international law is growing “without any overall plan” “there is a danger that international law as a whole will become fragmented and unmanageable” 698.

3. Species of fragmentation

357. So far I have proceeded without defining fragmentation. In fact two broad concepts may be identified: “fragmentation” and “proliferation”. Fragmentation will be used here to refer to substan-

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696. The topic was originally included on the ILC’s programme under the title “Risks Ensuing from the Fragmentation of International Law”: ILC *Ybk* 2000/II (2), p. 131. This was subsequently and finally changed in 2002 to “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”. See ILC *Ybk* 2002/II (2), p. 98.
tive fragmentation, i.e. the product of conflicting but equally authoritative pronouncements on international law by courts and tribunals. Proliferation refers to institutional fragmentation, i.e. the great expansion in the number of international courts and tribunals of competing jurisdiction since the 1980s.

358. To the problems of fragmentation and proliferation may be added a further concern: the so-called self-contained regime. A self-contained regime is said to occur where a particular substantive or institutional field of international law develops to such an extent that it effectively displaces the general law. In such a situation, the regime so created no longer interacts with international law, even though it may owe to international law its existence and external legitimacy.

B. Substantive Aspects of Fragmentation

1. Fragmentation as a crowded bar

359. According to Article 38 (1) (d) of the Statute of the International Court, judicial decisions are a subsidiary source for the identification of international law: nowhere is it said that the judicial pronouncements of one court carry more weight than any other. This lack of hierarchy can result in a situation in which many different voices shout from many different rooftops, with none able to be heard over the other.

360. A key example of this process arose from the International Criminal Tribunal for the former Yugoslavia, which has engaged in several differences of opinion with the International Court. Whilst these have usually taken the form of the two institutions talking past each other, on at least one occasion the situation has become a full-fledged dialogue, with contrary views forcefully presented.

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361. One point of divergence occurred in the context of belligerent reprisals. In the *Martić* case, Trial Chamber I held that armed reprisals against civilians were in all cases forbidden\(^{702}\), a position which was contradicted by the International Court two months later in the *Nuclear Weapons* Advisory Opinion, in which it held that such reprisals could indeed be lawful if necessary and proportional\(^{703}\).

362. A more profound divergence occurred in the context of attribution to the State of the conduct of non-State actors\(^{704}\). In *Nicaragua*, the International Court held that attribution required it to be shown that the State in question possessed *effective control* of the relevant non-State actor in relation to the alleged conduct\(^{705}\). Applying that test to the US support for the Nicaraguan *contras*, it was held that the United States could not be held generally responsible for all acts of these paramilitary groups, notwithstanding that a considerable measure of logistical and other support had been provided. This finding was called into question by the ICTY in *Tadić*. As an international criminal tribunal with jurisdiction limited to individuals, the ICTY would not need to address questions of State responsibility. In *Tadić*, however, the ICTY treated State responsibility as an antecedent question in order to classify the conflict in Bosnia as an international rather than a non-international armed conflict: many of the charges against *Tadić* depended on that classification. The Trial Chamber — Judge McDonald dissenting — relied on the test proposed in *Nicaragua*, and held that the actions of the *Republika Srpska* could not be sheeted home to the Federal Republic of Yugoslavia, notwithstanding that *Republika Srpska* was largely dependent upon the FRY for its existence\(^{706}\).

363. On appeal by the prosecution, the Appeals Chamber affirmed the Trial Chamber’s decision, but criticized its reliance on *Nicaragua*, arguing that the International Court’s use of the effective control test was contrary to the logic of State responsibility. Rather, the Appeals Chamber argued for a lesser standard of *overall control*

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\(^{706}\) *Prosecutor v. Tadić*, ICTY, IT-94-1-T (Trial Chamber, 7 May 1997), para. 216.
in certain circumstances. This test was unsurprisingly seen as authoritative by the Trial Chambers of the ICTY and was applied systematically in later cases.

364. The International Court returned to the question of responsibility for non-State actors in Bosnian Genocide. This arose from the same factual matrix as Tadić: the question was whether the FRY (and, later, Serbia) was responsible for acts of genocide committed by Bosnian Serb militias during the Bosnian War. The Court here made a concerted effort to engage with the jurisprudence of the ICTY, but it affirmed the effective control test in Nicaragua, rejected the reduced threshold advocated by the Appeals Chamber in Tadić, stressing that the question “was not indispensable in the exercise of [the ICTY’s] jurisdiction”, and that the ICTY’s expertise did not extend to “issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it”.

709. The Court had flagged its intention to hold fast to the effective control test in Nicaragua in the Armed Activities case. The Court there was called upon to decide whether the conduct of certain auxiliaries operating in the Democratic Republic of the Congo could be attributed to Uganda. It held that the required level of instruction, direction or control within the meaning of the provision had not been made out on the facts, citing Nicaragua in support: Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 226 (para. 160).
2. Substantive fragmentation and its resolution

365. Although the level of disagreement between the International Court and ICTY evidenced in these exchanges are prima facie perturbing, it may fairly be asked whether fragmentation is really a problem.\(^{711}\)

366. The notion that different elements of a judicial system can have a different idea of what the law is will come as no surprise to any lawyer who has been trained in a federal jurisdiction in which separate regions possess separate judicial hierarchies. To take one example concerning the US Alien Tort Statute,\(^{712}\) a significant split developed between the different circuit courts of appeal\(^{713}\) as to whether foreign corporations could be held liable for violations “of the law of nations”. It is true that the US federal system contains a resolving element, namely a court of final appeal in the form of the US Supreme Court. But as we have seen in *Kiobel*\(^{714}\), the mere fact of a hierarchy of courts within a system does not mean that arguments will inevitably be resolved: a court may elide an issue, or a split may develop within the Bench that masks the long-term significance of the decision.\(^{715}\) In such a situation, litigants may be left with contradictory pronouncements of formally equal weight. But this does not signify the collapse of the system.

367. The second point to be made is that the existence of multiple formally equal statements does not prevent international law from exercising a preference, although it may take time for the preference to emerge. Article 38 (1) (d) of the Statute of the International Court

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\(^{714}\) *Kiobel, Individually and on Behalf of Her Late Husband et al. v. Royal Dutch Petroleum Co. et al.*, 569 US (2013).

refers to highly qualified publicists as a subsidiary means for determining the law. Scholarly criticism may thus play a role, sometimes an important one. The pronouncements of the ILC, charged under the terms of its Statute with the “the promotion of the progressive development of international law and its codification”\textsuperscript{716}, carry unusual normative force and may help to resolve difficult legal issues. In the case of State responsibility for non-State actors, the Articles on the Responsibility of States for Internationally Wrongful Acts\textsuperscript{717} expressly approved the International Court’s formulation of effective control in its commentary to Article 8\textsuperscript{718}, confining \textit{Tadić} to its facts. It thereby avoided contradicting the Appeals Chamber while expressing a preference for the test of attribution in \textit{Nicaragua}\textsuperscript{719}. Article 8, in turn, was applied by the Court in \textit{Bosnian Genocide}, confirming the approach in \textit{Nicaragua}\textsuperscript{720}. The Court’s formulation must be seen as the default rule\textsuperscript{721}.

368. This episode highlights two further points. First, it suggests that despite the lack of a formal hierarchy between international courts and tribunals, the pronouncements of the International Court, the only permanent tribunal of general jurisdiction, carry particular weight\textsuperscript{722}. This may provide a centre of gravity. Second, it demonstrates that international law is not inherently hostile to the notion of a rule confined to a particular factual or institutional context, as in \textit{Tadić}\textsuperscript{723}.

369. This suggests — \textit{Hirsi Jamaa} notwithstanding — that fragmentation poses no real threat to international law as a system. The instances of disagreement between courts and tribunals rarely mature into outright conflict, and even if they do, the system allows for legal preferences to be expressed over time, such that a choice between two differing norms may eventually be made. Perhaps even

\begin{itemize}
\item \textsuperscript{717} ILC Ybk 2001/II (2), p. 20.
\item \textsuperscript{718} Ibid., p. 47 (para. 4).
\item \textsuperscript{719} Crawford, \textit{State Responsibility: The General Part}, op. cit., p. 154.
\item \textsuperscript{720} Application of the Convention on the Prevention and Punishment of the Crime of Genocide, op. cit., p. 208 (para. 399).
\item \textsuperscript{721} Crawford, \textit{State Responsibility: The General Part}, op. cit., p. 156.
\item \textsuperscript{722} See generally M. Andenas and E. Bjorge (eds.), \textit{A Farewell to Fragmentation: Reassertion and Convergence in International Law} (Cambridge, CUP, 2014).
\item \textsuperscript{723} Prosecutor v. \textit{Tadić (Jurisdiction)}, op. cit., 434 ff.
\end{itemize}
Hirsi Jamaa may be only the beginning of the debate over collective expulsion, not the last word on it.

C. Institutional Aspects of Fragmentation

1. The overlapping jurisdictions of international courts and tribunals

370. The post-Cold War era has seen the establishment of a number of new international courts or tribunals. By and large, these are specialized in character and limited in terms of their jurisdiction ratione materiae. But they still all function — or at least purport to function — within the same ocean of international law.

371. Two broad reasons for this proliferation may be identified. In the first place, the traditional reluctance of States to submit bilateral disputes to third party adjudication has decreased. In the second, globalization and increasing interdependence has resulted in complex problems of interaction, and the corresponding production of detailed norms of international law. One need only compare the provisions of the UN Convention of 1982 with the 1958 Geneva Conventions on various aspects of the law of the sea; the same may be said of a comparison of the provisions of the WTO covered agreements with the 1947 General Agreement on Tariffs and Trade. The increasing complexity of such norms has resulted in a need for specialized systems of dispute resolution.

724. Brown, op. cit., pp. 22-23. Shany, op. cit., pp. 3-4, offers a more detailed taxonomy, including: (1) the increased density, volume and complexity of international norms, which require sufficiently complex forms of dispute resolution; (2) greater commitment to the rule of law in international relations; (3) the easing of international tensions post-Cold War; (4) the positive experience of States with earlier specialist international courts, such as the European Court of Human Rights or the Court of Justice of the European Communities; and (5) the perceived unsuitability of the International Court of Justice to adequately address specialized and technical disputes.


372. But with such systems, new problems may arise. This may be the case when the obligations incumbent on States in one arena prevent them from relying on other international law rights justiciable before another tribunal. One example is the *Mexico — Soft Drinks* case before the WTO. In that case, Mexico had imposed a series of taxes on soft drinks and other beverages that used a sweetener other than cane sugar. Unsurprisingly, the United States — whose companies both produced in and imported to Mexico soft drinks sweetened with corn syrup — protested, claiming that the measures were inconsistent with GATT Articles III (2) and III (4).

373. This could be considered a fairly banal case concerning the national treatment provisions of the GATT, but for the fact that Mexico imposed these measures as a consequence of a long-running dispute with the United States under the North American Free Trade Agreement (NAFTA). Mexico had initially invoked NAFTA’s dispute settlement procedures in relation to US restrictions on imports of Mexican sugar, which Mexico claimed were contrary to a specific agreement under NAFTA guaranteeing market access. NAFTA Chapter 20 envisaged that disputes would be resolved by a standing roster of panellists, failing which NAFTA panels were to be assembled on an *ad hoc* basis. Unfortunately this permitted the United States to obstruct dispute settlement by simply refusing to appoint its panellists. The Mexican Congress introduced the GATT-inconsistent trade measures as a form of countermeasure, although they were not well articulated as such.

374. Mexico argued that the WTO dispute was inextricably linked to the pre-existing NAFTA dispute, and asked that jurisdiction be declined accordingly. At the centre of the Mexican argument was the notion that the WTO’s adjudicative bodies possessed certain implied powers, including the capacity to decline jurisdiction “in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims


cannot be judicially enforced in the WTO, such as NAFTA provisions”. In this it was unsuccessful. The Panel considered that the terms of the WTO Dispute Settlement Understanding did not permit it to choose whether to decline an otherwise valid jurisdiction. Declining jurisdiction would amount to a failure to address the matter before it and would, moreover, diminish the rights of the United States. In light of DSU Article 3.10, which states that “Members should not link complaints and counter-complaints in regard to distinct matters”, Mexico had no business linking its NAFTA dispute to the WTO case, and of course the Panel had no authority to rule on breaches of NAFTA.

375. This decision was upheld by the Appellate Body, which said that

“it is difficult to see how a panel would fulfill [its] obligation [to adjudicate a valid dispute] if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it”.

For the Panel to decline jurisdiction would be to “disregard or modify” the provisions of the DSU. The presumption of the language of the DSU and the reasoning of the Panel and Appellate Body is that in declining jurisdiction, the United States would be deprived of any legal recourse against Mexico’s actions. As it

734. The Panel placed particular reliance on DSU, Art. 11, which provides relevantly that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”.
735. Panel Report, Mexico — Soft Drinks, op. cit., paras. 7.4-7.9, noting DSU, Arts. 3.2. and 19.2.
736. Ibid., paras. 7.11, 7.15.
738. Ibid., para. 46. The Appellate Body here noted its earlier decision India — Patents, where it was said:

“[a]lthough panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU . . . Nothing in the DSU gives the panel the authority either to disregard or to modify . . . explicit provisions of the DSU”.

happened, the NAFTA tribunal the United States had deliberately stymied was capable of determining both sets of complaints together\textsuperscript{739} — the result of the action, therefore, was to deprive Mexico of access to justice under NAFTA, Chapter 19.

376. The particular wording of jurisdictional provisions may lead to adverse outcomes, even within the same system. The signal example of such intra-system conflict occurred in the investment arbitration cases of \textit{Lauder v. Czech Republic}\textsuperscript{740} and \textit{CME v. Czech Republic}\textsuperscript{741}, which resulted in what has been described as “the ultimate fiasco in investment arbitration”\textsuperscript{742}. Both cases concerned the investment by a US national, Ronald Lauder, in the Czech private broadcaster TV Nova through an investment vehicle CME, a Dutch company owned by Lauder. Following, \textit{inter alia}, the alleged interference of the Czech Media Council in the operations of TV Nova, Lauder brought a personal action under the Czech/United States bilateral investment treaty. The \textit{Lauder} tribunal held unanimously that although the Czech Republic had committed certain breaches of the BIT, these nevertheless did not give rise to liability because of lack of causation of damage suffered. Shortly after the \textit{Lauder} proceedings were initiated, however, CME launched its own investment proceedings under the Czech/Netherlands bilateral investment treaty making substantially the same allegations on the basis of the same facts. Shortly after the \textit{Lauder} award was rendered, the \textit{CME} tribunal issued a partial award that reached diametrically the opposite conclusion, eventually awarding the claimant US$270 million in damages (a sum proximate to the Czech Republic’s annual health budget at the time). An attempt to have the award set aside before the Swedish courts\textsuperscript{743} failed on the basis that the formal non-identity of Lauder as an individual and CME as a company prevented the application of principles of \textit{res judicata} or \textit{lis alibi pendens} so as to

\textsuperscript{739} Henckels, \textit{op. cit.}, 579.
\textsuperscript{741} CME Czech Republic BV (The Netherlands) v. Czech Republic, Partial Award, (2001) 9 ICSID Reports 121; Final Award, (2003) 9 ICSID Reports 264.
\textsuperscript{743} Czech Republic v. CME Czech Republic BV (Judicial Review: Sweden), (2003) 9 ICSID Reports 439.
prevent concurrent litigation of the same dispute before different tribunals\textsuperscript{744}.

2. \textit{Proliferation and comity}

377. Such cases — one inter-systemic, one intra-systemic — give cause for concern. Apart from diminishing confidence in the integrity of international dispute settlement, and the systematicity of international law, one cannot say justice was done in either of these situations. But, as with substantive issues associated with fragmentation, the problem is not necessarily pathological. Similar problems have been faced and largely overcome as between domestic courts or tribunals by techniques of private international law.

378. Within private international law, the willingness to surrender jurisdiction or stay proceedings in the event of a more appropriate forum is generally justified by reference to “comity”\textsuperscript{745}. As the Supreme Court of Canada said in one case:

“Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.”\textsuperscript{746}

379. Comity represents an exercise of discretion by the court or tribunal that weighs its own jurisdiction against the interests of the parties and the conflicting jurisdiction, actual or anticipated, of other courts or tribunals\textsuperscript{747}. It is

“a flexible doctrine enabling the cooperation of tribunals in the international legal order. . . . [I]t can rationalize the tension between an international dispute settlement forum’s jurisdiction and the non-hierarchical nature of such fora. In the sense that it


\textsuperscript{747} See, e.g., Henckels, \textit{op. cit.}, 584-585; Shany, \textit{op. cit.}, pp. 260-266.
functions as a principle for resolving issues of overlapping jurisdiction, it operates to permit a tribunal to limit its own jurisdiction where exercise of that jurisdiction would be unreasonable or inappropriate . . .” 748

380. This may result in the court or tribunal declining jurisdiction or staying proceedings over matters more appropriately heard elsewhere. It is a discretionary power, not a legal requirement; no textual reading of a court or tribunal’s constitutive instrument or procedural rules such as that undertaken by the Panel and Appellate Body in Mexico — Soft Drinks will mandate its use. It derives from the inherent power of international courts and tribunals to protect the integrity of the judicial process. As Judge Higgins said in the Use of Force cases 749

“[t]he Court’s inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules” 750.

She referred to

“the very occasional need to exercise inherent powers may arise as a matter in limine litis, or as a decision by the Court not to exercise a jurisdiction it has” 751.

381. An example of how such an approach might affect the contours of international dispute settlement occurred in serial litigation brought by Ireland against the United Kingdom concerning the operation of the MOX nuclear reprocessing plant at Sellafield 752. Four decisions were produced: (1) a judgment of the International Tribunal for the Law of the Sea on a request for provisional measures 753; (2) an arbitration award under the OSPAR Conven-

748. Henckels, op. cit., 584.
750. Ibid., pp. 1361-1362 (para. 10) (sep. op.).
751. Ibid., p. 1362 (para. 11) (sep. op.).
tion\textsuperscript{754} in proceedings for access to information concerning the operation of the plant\textsuperscript{755}; (3) an order by an UNCLOS Annex VII tribunal\textsuperscript{756}; and (4) a judgment of the European Court of Justice in proceedings brought against Ireland by the European Commission holding that commencing the UNCLOS proceedings breached EU law\textsuperscript{757}. The ITLOS proceedings determined that the distinct character of each of the relevant proceedings meant that UNCLOS Article 282 did not deprive it of jurisdiction\textsuperscript{758}. Similar conclusions were reached by the PCA tribunal in the OSPAR proceedings\textsuperscript{759}. The Annex VII tribunal, however, decided to stay proceedings on the basis that

“there is a real possibility that the European Court of Justice will be seized of the question of whether the provisions of the Convention on which Ireland relies are matters in relation to which competence has been transferred to the European Community, and indeed . . . the exclusive jurisdiction of the European Court of Justice . . . In these circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of the resolution of the


\textsuperscript{755} Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom), (2003) 126 ILR 334.


\textsuperscript{757} European Commission v. Ireland, Case C-0459/03, [2006] ECR I-4635.


\textsuperscript{759} OSPAR Convention Dispute, op. cit., 378.
problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.”

382. As perhaps anticipated by the Tribunal, the European Court of Justice subsequently held that Ireland had no right to bring arbitration proceedings before any other forum with respect to the MOX Plant.

383. To apply this principle to the examples given above, comity would operate so as to give the Panel in *Mexico—Soft Drinks* capacity to decline jurisdiction in favour of the NAFTA tribunal. Similarly, the tribunal in *CME*, knowing that *Lauder* was on foot, should have stayed its hand notwithstanding the lack of formal identity between the claimants in the two arbitrations.

384. Comity is not the only solution. The concepts of *lis alibi pendens* and *res judicata*, flexibly applied, could provide a means to prevent duplication of proceedings. But despite attempts by some scholars to argue that a general principle of *lis pendens* exists in international law, no court or tribunal has yet pronounced on its scope.

385. To conclude, the problems that result from proliferation tend to emerge not due to a failure of the system as a whole, but due to the rigidity of the jurisdictional provisions of individual courts or tribunals. It is true, as the Appeals Chamber said in *Tadić*, that international law does not provide for an integrated judicial system, but this does not mean that judges and arbitrators are justified in throwing up their hands. The tools necessary to address problems of proliferation are already available.

**D. Self-contained Regimes**

386. Finally, I turn to self-contained regimes. The term has a respectable provenance, deriving from the decision of the Permanent Court in *The SS “Wimbledon”*. The Court was faced with the question whether the provisions of the Treaty of Versailles relating to German waterways applied to entitle non-neutral passage through

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762. Henckels, op. cit., 592-598.
764. Versailles, 28 June 1919 (in force, 10 January 1920), 225 CTS 188.
the Kiel Canal at a time when Germany was not a belligerent. The Court noted that the Treaty contained a special section on the Canal, which differed from its general provisions relating to watercourses:

“The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous sections of Part XII, they would lose their ‘raison d’être’ . . . The idea which underlies [the specific provisions regarding the Kiel Canal] is not to be sought by drawing an analogy from these provision but rather by arguing a contrario, a method of argument which excludes them.” 765

387. The “SS Wimbledon” concerned the interaction between general and specific rules within the same treaty: the Court could as well have applied the lex specialis rule as have referred to self-contained provisions. But the International Court went further in Tehran Hostages, holding that the legal consequences described in the Vienna Convention on Diplomatic Relations766 (for example, declaring a diplomat persona non grata) were not merely self-contained but amounted to a regime:

“The rules of diplomatic law . . . constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their very nature, entirely efficacious.” 767

388. Both cases were taken into account in the ILC’s work on State responsibility. ARSIWA Article 55 codifies the lex specialis principle768, providing that

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765. The SS “Wimbledon” (United Kingdom, France, Italy and Japan v. Germany; Poland intervening), (1923) PCIJ, Ser. A, No. 1, p. 24.
“[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”.

The Commentary makes reference to both “strong” and “weak” forms of *lex specialis*, with only the former constituting a self-contained regime, properly so-called. 769

389. Thus, in a broad sense, a self-contained regime is little more than a strong form of *lex specialis*, by which a “geographically or functionally limited treaty series” attempts to contract out of the secondary rules of international law that underpin the system as a whole. 770. More narrowly, however, such regimes may represent comprehensive sub-systems that cover a particular international law problem in a different manner from how it might be otherwise dealt with. 771. Such subsystems, some have suggested, threaten the coherence of international law: “when such deviations become general and frequent, the unity of the law suffers” 772. One is reminded of the words of the prophet Ezekiel: “[t]heir appearance and their work was as it were a wheel in the middle of a wheel” 773.

390. Hints of a dystopian future might be seen in those self-contained regimes which are stronger than the system of diplomatic relations. A commonly cited example is that of the WTO 774. It possesses a detailed set of primary norms and a compulsory system of dispute settlement. Its specialized regime of remedies — notably the system of suspension of concessions contained in DSU, Articles 19 and 22 — is comprehensive, leading some to the conclusions that in transiting from the GATT, the WTO moved decisively towards a self-contained regime 775.

391. Another example is that of the European Union 776. The

769. ILC Ybk 2001/II (2), p. 140 (para. 5).
772. Conclusions of the ILC Study Group, op. cit., para. 10.
773. Ezekiel 1:16 (King James Version).
Treaty establishing the European Community\textsuperscript{777} has established its own legal system\textsuperscript{778}, one which requires that members “shall not fail to carry out their obligations and shall not take the law into their own hands”\textsuperscript{779}. To the extent that the customary rules of State responsibility are applicable, they are only residual — and as the system of European law matures, any remaining \textit{lacunae} are gradually being plugged\textsuperscript{780}.

\section*{1. Self-contained regimes, lex specialis and the law of treaties}

\textsuperscript{392} But again the problems posed by self-contained regimes should not be exaggerated. If States wish to enter into comprehensive relationships that, in effect, contract out of the remainder of the law (peremptory norms aside\textsuperscript{781}) they are free to do so. The task of international law in such a circumstance is to ensure that a framework “through which such systems may be assessed and managed in a legal-professional way”\textsuperscript{782}. Conflicts between general and specific norms of international law may thereby be prevented, and a workable compromise reached\textsuperscript{783}.

\textsuperscript{393} However, it is rather difficult for an inter-State system to contract completely out of general international law — indeed, there does not presently exist an entirely self-contained interstate regime\textsuperscript{784}. For example, the WTO Appellate Body has acknowledged that the GATT “is not to be read in clinical isolation from public international law”\textsuperscript{785}. In \textit{Korea — Procurement}, the Panel said that customary law remains a source of law for the WTO “to the extent

\begin{thebibliography}{99}
\bibitem{777} 24 December 2012, 2002 OJ, C-325/35.
\bibitem{778} 24 December 2012, 2002 OJ, C-325/35.
\bibitem{779} \textit{European Commission v. Luxemburg & Belgium}, Cases 90/63 and 91/63, [1964] \textit{ECR} 625.
\bibitem{780} Simma and Pulkowski, “\textit{Leges Speciales and Self-Contained Regimes}”, \textit{op. cit.}, 153.
\bibitem{781} \textit{OSPAR Convention Dispute}, \textit{op. cit.}, 364.
\bibitem{782} Conclusions of the ILC Study Group, \textit{op. cit.}, para. 12.
\bibitem{784} Report of the ILC Study Group, \textit{op. cit.}, para. 120; Simma and Pulkowski, “\textit{Leges Speciales and Self-Contained Regimes}”, \textit{op. cit.}, 143.
\end{thebibliography}
that the WTO treaty agreements do not ‘contract out’ from it". This is the default position in international law for any treaty. Similar conclusions may be reached with respect to the system’s treatment of general principles of law. Indeed the WTO is one of the most influential users of the VCLT in matters of treaty interpretation. Similarly, the European Court of Justice has asserted that there is a residue of general principles of international law within the context of EU law, and in the interpretation of an international agreement, has indicated its willingness to defer to the decisions of tribunals established pursuant to that agreement. As Simma and Pulkowski note, “the term ‘self-contained regime’ should not be used to circumscribe the unrealistic hypothesis of a fully autonomous legal system”.

E. Conclusion: The Centre Holds

394. All this suggests that the problems to which the label of “fragmentation” has been attached may be little more than by-products of a maturing system of law, albeit one lacking in vertical integration. Given that international law grew from bilateral relationships, it is difficult to see how anything has become more fragmented than it was at the beginning: it has just become more diverse. Multilateralism never meant complete coherence of treaty practice or State interest. If States are free to join multilateral treaties, they are free to create a partly fragmented system.

395. And yet, and yet. The instinct of any system is its own preservation and perpetuation: international law is no different. In the midst of a period of immense, even exponential, growth, it retains the tools necessary to maintain its own coherence. This has been shown for substantive fragmentation (the allocation of


preferences within the system), institutional proliferation (the introduction of comity to international dispute settlement) and self-contained regimes (application of the lex specialis rule and the VCLT to manage and resolve conflict). The result is a system which itself acts as guide, in the mode of Dante’s Virgil:

“‘You, as you speak, have so disposed my heart in keen desire to journey on the way that I return to find my first good purpose. Set off! A single will inspires us both.’

All this I said to him as he moved on. I entered on that deep and wooded road.”

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791. Dante, op. cit., II.136-142.

“‘Tu m’hai con disiderio il cor disposto si al venir con le parole tue, ch’i’ son tornato nel primo proposto. Or va, ch’un sol volere è d’ambedue: tu duca, tu segnore e tu maestro . . . ’ Così li dissi; e poi che mosso fue, intrai per lo cammino alto e silvestro.”
CHAPTER X

UNIVERSALITY OF INTERNATIONAL LAW

“Nothing could be more fallacious than to judge of China by any European standard.”

George, 1st Earl Macartney (1794) 792.

“The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . . .”

GA res. 217A (III), 10 December 1948.

A. Introduction

396. Modern international law claims to be universal as far as our one world is concerned. It even has rules about how we are to behave in outer space, and some of these are in “all States” form; whether they are binding on extra-terrestrials is a so-far-unanswered question 793. But humanly speaking, one may think there is no greater form of universality than that.

397. Yet our international law has a specific origin in European political thought and practice. These European origins of what we now call general international law create a considerable tension. Despite its claim to universality, it is often thought that international law cannot attract the real allegiance of other cultures and peoples. At most they will observe it for pragmatic reasons, and then only approximately. Meanwhile the peoples of the book (whether the book is the De Jure Belli ac Pacis of Grotius or Le droit des gens of


793. See, e.g., Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, New York, 5 December 1979 (in force, 11 July 1984), 1363 UNTS 3 (applies to States (Art. 3) who along with intergovernmental organizations may bear international responsibility for conducting space activities (Arts. 14, 16)); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Washington, Moscow, London, 27 January 1967 (in force, 10 October 1967), 610 UNTS 205 (applies to States (Art. XIII); intergovernmental organizations may also be internationally responsible (Art. VI)).
Vattel or the *Max Planck Encyclopedia* of our own time) proclaim it as intimately associated with what is right. The tension also manifests itself when developments in international law are under discussion — whether these concern, for example, a putative right to democratic governance going beyond the meagre provisions of Article 25 of the ICCPR or the ambitiously expressed rights of indigenous peoples articulated in the United Nations Declaration on the Rights of Indigenous Peoples. As to the former, how can international law require democracy as *the* form of government when many States, including some of the world’s largest and most powerful, are not democratic or are only superficially so? As to the latter, what room is there for special indigenous rights in non-settler societies which are still struggling to achieve national unity and economic development with all that entails?

398. One way to resolve this tension is to redefine international law as a coalition of the virtuous or the like-minded, for

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796. *Hilf al-Fudul*, meaning “The Alliance of the Virtuous”, was a convention agreed in Mecca in the year 590 between the warring chiefs of various kingdoms in the region. Parties to the alliance pledged to resist oppression and injustice, to abide by a set of rules regulating war and peace, to safeguard trade and to protect visiting delegates and merchants. The formation of the alliance was said to have been attended by the prophet Muhammad 20 years before the advent of Islam: see, e.g., S. Khatab and G. D. Bouma, “Islamic International Law”, in *Democracy in Islam* (Routledge, Oxford, 2007), pp. 167-168.

example to condition statehood upon democracy\textsuperscript{798}, the observance of human rights or \textit{l'état de droit}\textsuperscript{799}. Under this strategy (which as far as I know has never been espoused by someone who was not a national of a virtuous State), international law continues to be — what some thought it was in the late nineteenth century — the law of and between self-proclaimed civilized States only\textsuperscript{800}.

399. But whether that view of international law ever prevailed, it is completely unacceptable now. It is of the essence of modern international law that it is universal. We are struggling towards the point where there is a cadre of treaties to which every State without exception is party; let us not engage in the error of exclusivity by reference to some subset of so-called liberal values and so-called liberal States. That would only risk reintroducing colonialism in another guise. The “clash of civilizations”\textsuperscript{801} is contained within international law; it is not set against it by any principle of exclusion or subordination.

400. In this chapter we will begin by considering how this situation came to be, how a system that originated in Europe now claims universality. We will then consider what the universality of international law amounts to in practice today.

\textbf{B. The History of Universality}

1. \textit{Origins: from the seventeenth to the nineteenth century}

401. It is true that the historical origins of international law lie mainly in a particular time and place: early modern Europe. But

\begin{itemize}
\item \textsuperscript{801} S. P. Huntington, “The Clash of Civilisations” (1993) 72 (3) \textit{Foreign Affairs} 22-49.
\end{itemize}
even during that period international law accepted neighbouring non-European States as participants in the system, such as the Ottoman Empire as early as 1649. In effect, as Gerry Simpson observes, early modern international law was riven by two seemingly contradictory ambitions: “[f]irst, Europe was to establish itself as a unique and superior legal and cultural order” and “[s]econd, it was to export this order through the adoption of universalist forms”.

The prevalent view was unashamedly chauvinistic — it asserted, or rather assumed, that Europe was a society uniquely amenable to the international rule of law.

This line of thinking was still evident in international law texts as late as the early twentieth century. Thus Hall’s treatise, the leading treatise by a British author of the time:

“It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation.”

But by that time, what Hall even called the “international society for export” had been exported to the rest of the world. It had travelled to the further reaches of Africa and Asia, to the Americas, to

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802. See, e.g., Instrument for the Prolongation of the Peace between the Emperor of the Holy Roman Empire and the Sultan of Turkey, 1 July 1649, 1 CTS 457.
804. W. E. Hall, A Treatise on International Law (London, Oxford & Co., 6th ed., 1909), p. 39, quoted in Simpson, op. cit., p. 237. Lorimer displays a similar sentiment. He suggests that States are fundamentally unequal and that participation in the international system of States (what he terms full political “recognition”) is a right belonging only to “sufficiently developed” and “civilised nations”, not to those that are less powerful or whose actions contradict “natural law” (which he defines as an expression of “spirit” and the “ethical ideal” as manifested through a correct use of rationality). He contends that ethnicity, race and religion, other than the superior Christian faith, present obstacles to advancing a nation’s stage of development: “The right of undeveloped races . . . is not to recognition . . . but to guardianship — that is to guidance — in becoming that of which they are capable, in realising their special ideals”, “we ought, perhaps, to distinguish between the progressive and the non-progressive races”. See J. Lorimer, The Institutes of the Law of Nations — A Treatise of the Jural Relations of Separate Political Communities (Edinburgh, London, William Blackwood and Sons, 1883), pp. 1, 12, 97-99, 102, 156-157.
805. Hall, op. cit., p. 236.
Australia and to even the most remote Pacific islands in the holds of gunboats and the baggage of colonizers.

403. The case of China is particularly striking. In 1792, Lord Macartney led a British embassy to the Qīng court, under instructions from his Government to open permanent diplomatic relations between the two countries on the European model. He was treated with disdain, kept waiting and eventually sent home bearing a letter of rejection from the Qiánlóng Emperor, ruler of all under heaven, to George III of Great Britain. “O King”, it began, “inclining your heart towards civilization, you have specially sent an envoy to present a state message” from which “your sincere humility and obedience can clearly be seen”.

It advised the British monarch to “simply act in conformity with our wishes by strengthening your loyalty and swearing perpetual obedience so as to ensure that your country may share the blessings of peace” 806.

To this day it is unclear whether Macartney actually kowtowed (by touching the ground with his head, according to Chinese custom, to display submission), though the Emperor’s letter asserts that he did.

404. The internal rule of law was not a foreign concept in late eighteenth-century China 807. But the incident shows that China conceived of relations with foreign rulers exclusively in terms of subordination; it had no room for sovereign equality. At the time China had only a “Department of Foreign Tribute” rather than a European-style department of foreign affairs 808. Yet eventually, in 1860, China did create such a department and did send envoys abroad 809. That was the year that the Second Opium War culminated in the sacking of the Summer Palace and the “unequal treaties” with

806. A translation of the original Chinese version of the letter is in Peyrefitte, op. cit., pp. 289-292. The version read by Macartney was translated by Jesuit missionaries who had “carefully altered the most insolent formulations, openly proclaiming their desire to remove ‘any offensive turn of phrase’”: p. 288.

807. It has been suggested that the debates from the eighth to third centuries BCE between Confucians (who sought to organize society around rules of propriety and held that to rely on law was to admit a failure of virtue) and Legalists (who sought to use norms or law to regulate society) “may be roughly compared” to Greek debates about “rule of man” and “rule by law”: S. Chesterman, “An International Rule of Law?” (2008) 56 AJCL 338-389.

808. Peyrefitte, op. cit., p. 291 n ‡.

809. Ibid.
France, Russia and the United Kingdom, which forced China to cede territory, notably Hong Kong. Thus even China was cowed.

405. Other States that resisted European colonialism, most notably Japan after the Meiji Restoration of 1868, embraced international law during processes of internal modernization. Even at this time, Wheaton’s *Elements of International Law* (1836) — translated into Chinese in 1864 and also adopted in Japan — characterized international law as Christian, “civilized” and European. Yet it was also clear that States such as China and Japan were sovereign, what Simpson refers to as:

“a recognition that states could be part of the international law society while at the same time excluded from the inner circle or family. Westlake [writing in the late nineteenth century] seems to envisage a sort of staggered admission policy: ‘Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it.’”

406. By the 1920s only seven States that were neither European nor former European settler colonies had managed to retain their independence without formal qualification to their sovereignty: they were Afghanistan, China, Ethiopia, Japan, Liberia, Siam (Thailand) and the Ottoman Empire (Turkey). There was no serious resistance to the international system which had been imposed in various ways in the meantime and whose structure was by then recognizably in place.

407. Since the mid-nineteenth century there has been only one serious attempt on the part of a major State to reject and abandon international law. This was pursued by the Russian Socialist Federative Soviet Republic (RSFSR) in the aftermath of the Bolshevik Revolution of 1917. The revolutionaries saw international law as an

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810. Treaties of Beijing: China-United Kingdom, 24 October 1860, 123 *CTS* 71; China-France, 25 October 1860, 123 *CTS* 79; China-Russia, 14 November 1860, 123 *CTS* 125.


imperial tool of and between capitalist States\textsuperscript{816}. The RSFSR initially identified the “State” in the sense of a subject of international law with the State in the Marxist sense of an organization of the ruling class. Since the Russian Revolution had resulted in a change of ruling class, the RSFSR could deny that it was the continuator of the international legal personality of tsarist Russia. What this meant in practice was that it could deny liability for tsarist debts\textsuperscript{817}. Soviet international lawyers such as Evgeny Korovin conceptualized this by arguing that a community of ideology shared by the ruling classes of different nations was a necessary basis for international law. There could be particular systems of international law that applied to the rights and obligations of States with comparable social structures and that bound them only insofar as they preserved those structures. A change in social structure as fundamental as the Russian Revolution resulted in a State losing the status of a subject of international law within the international system to which it previously belonged\textsuperscript{818}.

408. Despite the emphasis placed on class in the international relations of the RSFSR — and, from its foundation in 1922, the early Soviet Union — there was little to support Korovin’s views. The Soviet Union was able to re-enter the international community without abandoning its social system — indeed the twentieth century was full of examples of legal interaction between nominally socialist and capitalist States. As early as 1929, faced with the difficulty that a “socialist” system of international law could not explain relations between the Soviet Union and its capitalist neighbours, Korovin acknowledged that his original theories had been wrong\textsuperscript{819}.

409. Thus even the Russian Revolution and the alternative world view it posited did not lead to anything but a short-lived and incon-

\textsuperscript{816} J. N. Hazard, “Cleansing Soviet International Law of Anti-Marxist Theories” (1938) 32 AJIL 247. This view was put forward by Eugene Pushukanis, the then premier Soviet international law theorist. Pushukanis’s views modified over time, exposing his apparent disconnect from the new RSFSR ideology, to the glee of Eugeny Korovin, who seized the opportunity to reorient the Soviet view of international law and rise in stature.


\textsuperscript{818} Ibid., pp. 275-278, citing E. Korovin, “La république des Soviets et le droit international” (1925) RGDIP 290.

\textsuperscript{819} Ibid., p. 279.
sequential rejection of international law. Nor did the People’s Republic of China repeat the experiment after 1949, despite the lengthy delay on the part of the United States in recognizing it (not until 1979)\textsuperscript{820}. As for the Third World — to use a term then common\textsuperscript{821} — the former colonies which won their independence in the mid-twentieth century, virtually without exception and without protest, took their place in the existing international order. If international law remains the preserve of the “civilized” — and of course Article 38 (1) (c) of the Statute of the International Court still refers to “civilized nations” — then all States are now considered to fall into that category.

410. This is not to suggest that the universalization of international law was a one-way process of European expansion. Arnulf Becker Lorca has argued that a belief in its exclusively European slant “limits the scope of analysis and prevents an understanding of the global character of the historical processes through which international law became universal”\textsuperscript{822}. Its universalization was also influenced by the reinterpretation of certain elements of classical international law — positivism, sovereignty and civilization — by international lawyers in “semi-peripheral” societies such as Japan, the Ottoman Empire and Latin America:

“[B]y the dawn of the nineteenth century, a significant number of international legal regimes had governed, under some degree of formal equality, the interaction between some European and non-European sovereigns. During the course of the nineteenth century, semi-peripheral appropriations of international legal thought and the global circulation of rules, lawyers, and legal ideas transformed existing international legal regimes into a universal international law. ‘Universality’, as a consequence, describes not only international law’s geographic expansion, but also doctrinal changes, the global professional-


zation of international lawyers, and the transformation of the nature and functions of the international legal discourse." 823

411. This is an important qualification to the European origins of international law. The expansion of international law was not a matter simply of enforcing European norms on States such as China but also of abandoning such parochial notions as the distinction between civilized and uncivilized States through a process of interaction between different societies. Adjustments were made on both sides.

2. Challenges: the twentieth and twenty-first centuries

412. Did this close off the possibility of reviving a more parochial conception of international law? It did not, for there persist tendencies in Western writing that aim to do just that. Moreover there continue to be major divergences of policy, interest and approach among groups of States. As well as the distinction between “civilized” and “uncivilized” States in the nineteenth century and the contested notion of “socialist” international law in the twentieth, these have also produced claims to a special status for the law of decolonization and development 824 and the phenomenon of regionalism.

413. But these factors do not contradict the universality of international law. Rather what they show is that this universality, at least as we understand it today, is a historically contingent phenomenon, driven particularly by colonization and decolonization, shaped by the ideological conflicts of the twentieth century and subject to future developments. Nor is it the result of a Rawlsian negotiation among States in which they are postulated to have planned and consented to its basic structure 825. It is the fruit — perhaps more accurately, the early blossom — of a process of organic growth shaped by countless chance events, disconnected ideas and diverse influences that might well have had quite different results.

414. We might then say that international law is subjectively uni-

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universal: its universality depends on the historical fact that non-European States gradually accepted it as binding law as a matter of practice and circumstance. They did not derive it from some universal moral principle. But this does not prevent international law from making claims of objective universality: that it has some moral authority that would bind States regardless of the fact of their acceptance. One such claim to moral authority may be the idea of “universal” human rights — “meta-rights” that are pursued by specific legal regimes but that would exist independently of them. The Universal Declaration of Human Rights refers not to the creation or enactment of rights but to “recognition” of the “inherent dignity and of the equal and inalienable rights of all members of the human family”\textsuperscript{826}. Such claims to universal moral authority will not convince everyone. They rest on the controversial assumptions that there is such a thing as moral principle binding on all and that international law (or part of it, such as human rights law) draws authority from such a principle.

415. But the language of objective universality, whatever its philosophical underpinning, shapes how international law operates. Koskenniemi argues that we have become accustomed to thinking of politics as a process of separate identities or groups “seeking recognition” but that they can do so only in universal terms: “perhaps a right of self-determination, fair distribution of resources, equality of opportunity, and so on”. No group, especially not a vulnerable one, “can claim a right merely in terms of its separate ‘value-system’”\textsuperscript{827}.

416. There is a danger that this language of objective universality will act as a cloak for parochial values and interests. Sundhya Pahuja traces how the promised universality of international law “served to constrain, and ultimately to undermine the radical potential” of demands by decolonized States. This was because their attempts to use international law “were subsumed within a pervasive rationality that successfully made a claim for the universality of a particular, or ‘provincial’ set of values originating in and congenial to the North”, especially “the concepts of development and economic growth”\textsuperscript{828}. Decolonization was channelled into the formation of the develop-

\textsuperscript{826} GA res. 217A (III), 10 December 1948, Preamble.
mental State; claims to permanent sovereignty over natural resources were transformed into the protection of foreign investors; and “the asserted rule of international law” was transformed into “the internationalisation of the rule of law as a development strategy”829. Pahuja argues that in order to realize the universal promise of international law, to “decolonize” it of these parochial values and interests, “we need precisely to resist attempts to produce a framework that ‘recognises’ the universality of certain values”, including “development as a proxy for human well-being”. Instead we must acknowledge “the contingency of any value put forth as universal and the frame of reference supporting the universal claim”830.

417. Pahuja’s thesis is a warning against pretensions of objective universality. Not only are they philosophically controversial, in practice they may also serve parochial or even anti-universalist interests. We need not accept her specific critique of the concept of development and other putatively universal values in order to agree with this. At the same time, she urges us to acknowledge the subjectivity and contingency of the universality of international law. On the premise that international law is subjectively universal — and hence subject to dialogue and change — we can engage in what I have called “international law as process”: the process of claim and counterclaim, assertion and reaction, in this case applied not to a particular dispute but at the level of “universal” values and principles. We can observe this process at work everywhere in international law, including in the tension between general and specific legal categories and between universalism and regionalism.

C. Universality Today

1. Universality versus regionalism

418. An assumption of universality is evident in almost every area of international law. This is true not only of customary international law but also of many multilateral treaties and other international instruments, particularly those that seek to codify or progressively develop custom. It is expressed, for example, in the references

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830. Ibid., p. 260.
to “all States”, the “international community as a whole”, the “international community of States as a whole” and other such phrases in multilateral international instruments. Many of these have originated in the work of the International Law Commission (ILC), whose very first instrument, the draft Declaration on Rights and Duties of States, proclaimed in a resolutely universalist tone: “the States of the world form a community governed by international law” 831. Later instruments drafted by the ILC have tended to avoid references to such subsets as “developing” or “newly independent” States 832.

419. A number of reasons may be suggested for this tendency towards universality in multilateral treaties, whose States parties usually comprise only a fraction — though often a large fraction — of the whole number of States. They include the role of the ILC as a subordinate organ of the United Nations — the prototype of the universal international organization and still the “most” universal — and the representation within it, according to its Statute, “of the main forms of civilization and of the principal legal systems of the world” 833.

420. There are, however, also countervailing tendencies. One, in the special context of the law of the sea, can be identified in instruments such as the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), which recognizes such subsets, for the first time, as archipelagic, landlocked and “geographically disadvantaged” States 834.

421. While such conventional law developments as “archipelagic States” provide a functional salience to a subset of “island States” — a term that is itself not free from definitional debate — it also creates problems. First, the UNCLOS definition of an “archipelagic State” is arbitrary. It requires that an archipelagic State be “constituted wholly by one or more archipelagos and may include other islands” 835. Applying this definition, together with the rules on

831. ILC Ybk 1949, p. 287 (Preamble, para. 1).
835. Ibid., Art. 46 (a) (emphasis added).
archipelagic baselines\textsuperscript{836}, seems to exclude any offshore archipelago that is part of a mainland State, for example Hawaii. This amounts to discrimination and is a deviation from formal equality under international law\textsuperscript{837}. Second, by establishing archipelagic State sovereignty over archipelagic waters and superjacent air space\textsuperscript{838}, UNCLOS created one of the largest expansions (comparable to exclusive economic zones) of maritime jurisdiction in the history of the law of the sea, based entirely on the on grounds of certain States’ “special circumstances”\textsuperscript{839}. Even if an archipelagic State’s geographical layout is correlated with its developmental status, as a matter of legal principle it still gains a maritime windfall.

422. The category of geographically disadvantaged States presents another curious innovation. The essence of this category is that both developed and developing coastal States are entitled to some of the surplus living resources (i.e. fish) from the exclusive economic zone of neighbouring States under two conditions: (1) the “disadvantaged” State is dependent on the other State’s exclusive economic zone for the “nutritional purposes” of their population, or (2) it has no exclusive economic zone itself. These categories make very little sense. One category relates to dependency upon another State’s waters for subsistence, the other relates to a legal consequence of State maritime boundaries. This means that in principle, subject to the technical rules for exploitation\textsuperscript{840}, a self-sufficient developed coastal State that does not have an exclusive economic zone but has a healthy population, is just as entitled to some excess fish of a neighbouring State as is a developing coastal State that has an exclusive economic zone which cannot support its population but depends on sustenance from that other exclusive economic zone\textsuperscript{841}. In such cases as these the literal interpretation of

\textsuperscript{836} UNCLOS, Art. 47.


\textsuperscript{838} Subject only to transit and innocent passage: UNCLOS, op. cit., Arts. 52-53.

\textsuperscript{839} Crawford, “Islands as Sovereign Nations”, op. cit., p. 296.

\textsuperscript{840} UNCLOS, op. cit., Arts. 61, 62, 70 (3)-(4), (6).

\textsuperscript{841} G. Hafner, “Geographically Disadvantaged States”, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (OUP, 2008, online edition), para. 1. One restriction, however, is that developed geographically disadvantaged States may only participate in the exclusive economic zone of other developed States: UNCLOS, op. cit., Art. 70 (5).
“geographic disadvantage” seems not to be the primary reason that access is granted.

423. Thus even though decisions to establish special categories of States may be forged with good intentions, care must be taken to maintain the integrity of the principle of equality when considering the development of special rights. 842

424. More prominent is the phenomenon of regionalism. Although the situation of each State can be attributed to its “place in the world”, that “place” tends to be seen in the first instance in terms of the State’s immediate neighbours. The matters that most Governments spend most time on and which can affect them most tend to relate to their neighbours or their region. Indeed even when States focus on questions of apparently universal concern, their approach is likely to be influenced by regional postures and implications — and not only in such matters as minority rights or the use of international watercourses. Since 1945, regional approaches have developed in areas of international law such as peace and security, 843 the marine environment, 844 exploitation of marine natural resources, 845 the settlement of disputes, 846 disarmament (especially


843. See Charter of the United Nations, Chap. VIII, the various regional arrangements and alliances and the attempts to develop regional security doctrines during the Cold War. See also W. Rogers and W. M. Reisman, “The Brezhnev Doctrine and the Reagan Doctrine: Apples and Oranges?” (1987) 81 ASIL Proceedings 561. There has been a significant regional involvement in some “peacekeeping” issues (e.g., Liberia, Haiti), and the European Union asserted priority of concern at various stages of the Yugoslav crisis.


in the nuclear field) and of course economic development and free trade.

425. The proliferation of regional approaches to human rights might seem particularly significant given that human rights are expressly based on putative universal values — as the Universal Declaration of Human Rights emphasized with the very first word of its title. Regional human rights regimes enable individuals — to varying degrees — to seek redress for breach of more or less well-defined human rights by the State. But despite common aims and a similar legal and philosophical genealogy, the specific content of human rights, and of the mechanisms to enforce those rights, is nuanced between regional regimes — to the point of significant variation.

426. For example, the African Charter on Human and Peoples’ Rights emphasizes the indivisibility of human rights by substantively recognizing economic, social and cultural rights as well as protecting civil and political rights. It recognizes both the rights of each person and the collective rights of all peoples. Collective rights are recognized to a far greater extent than in other human rights instruments. In contrast, the European Convention on Human Rights only recognizes civil and political rights of individuals (or, strangely, use made of these treaties by the International Court in the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, pp. 248-250 (paras. 58-59) (the existence of these treaties gives rise to an a contrario argument with respect to deployment and testing of weapons elsewhere).

848. There is a proliferation of regional economic development and free trade areas: e.g., the European Communities, EFTA, CEFTA, NAFTA, MERCOSUR, COMESA.


852. ACHPR, op. cit., Preamble (para. 7), Chap. I. Cf. ACHR, op. cit., Preamble (para. 4), Chaps. II-III.

corporations). These differences reflect negotiating priorities linked to place and time. The European regime, though born from the ashes of war, was established in a region that was more or less accustomed to the language of individual rights as a currency of political debate. The later African regime was established in a region still yearning for collective and individual emancipation after decolonization.

427. The enforcement machinery for violations of “universal” human rights also differs between regional regimes. For example, the Inter-American Court of Human Rights has developed an innovative judicial penalty of non-pecuniary collective reparations — a remedy which seeks to preserve the name of the victim and to offer some form of recognition to the wider community affected. Reparations have included public acts of apology, the broadcasting of judgments on radio and the renaming of streets, all of which seek to educate current and future generations — especially where illiteracy or oral history traditions prevail — about human rights violations and to deter recurrence. In contrast, the European Court of Human Rights dispenses penalties that conform to judicial orthodoxy, including declarations of violation and pecuniary penalties. No doubt regional human rights regimes pursue similar “universal” meta-rights but these differ materially in their definition, practical application and implementation.

2. The legal significance of regionalism

428. For its part, the International Court has been reluctant to attribute any legal significance to regional considerations. Since its

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function, especially in contentious cases, is to pronounce on particular questions of international law arising in disputes between States, it might be expected to be sympathetic to considerations based on the regional interests or affiliations of those States. In fact it tends to see cases raising regional considerations through the prism of general international law.

429. In Asylum (Colombia/Peru), Colombia expressly relied on a “regional” rule of customary international law: it argued that in accordance with such a rule it was competent to qualify the offence committed by an asylum-seeker, by unilateral and definitive decision, for the purpose of granting him diplomatic asylum. \(^{858}\) The Court treated the existence of this “alleged regional or local custom peculiar to Latin-American States” \(^{859}\) as in effect a bilateral question:

“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. . . . Even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.” \(^{860}\)

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\(^{858}\) Asylum (Colombia/Peru), Judgment, ICJ Reports 1950, pp. 271, 274.  
\(^{859}\) Ibid., p. 276.  
\(^{860}\) Ibid., pp. 276-278 (emphasis added). The Convention on Political Asylum, Montevideo, 26 December 1933 (in force, 28 March 1935), 152 BFSP 231 was adopted with the express purpose of defining certain terms of the earlier Convention fixing the Rules to be observed for the Granting of Asylum, Havana, 20 February 1928 (in force, 21 May 1929), 132 LNTS 323. The text of the Montevideo Convention formulated general law-making propositions by using mandatory, express and specific language:

“It shall not be lawful for the States to grant asylum in legations, warships, military camps, or airships to those accused of common offenses who may have been duly prosecuted or who may have been sentenced by ordinary courts of justice, nor to deserters of land or sea forces.” (Art. 1.)

This provision replaced Art. 1 of the Havana Convention, which declared it “not permissible” for States to engage in such activities. Cf. the softened position in the Treaty on Asylum and Political Refuge, Montevideo, 4 August 1939 (in force, 29 September 1954), OEA/Ser.X/1, Treaty Series 34, trans. (1943) 37 AJIL Sup. 99-103:
It seems clear that the Court, despite its invocation of Article 38 (1) (b) of its Statute, was applying a stricter standard of proof than it would have done to a “universal” rule of general international law. In the case of such general rules it is not necessary that every State have specifically accepted or adhered to the rule: persistent opposition may render the rule inapplicable but must be consistent and clear, and is not manifested by a simple failure to ratify a treaty. In this case systematic elements of general international law — sovereignty, non-intervention, the regular enforcement of domestic law even against political offenders — overwhelmed considerations of “regional” custom or practice. Since the body of Latin American “regional” custom is by far the most sophisticated and generalized, it seems safe to infer that the same applies everywhere in the world. This is not to imply that regional or local custom can never be relied on, just that it must be proved as between the particular States parties to the dispute; it makes no difference whether the “region” in which the custom exists comprises two or twenty-two States.

This point is well illustrated in the Right of Passage case, where Portugal argued that local custom provided it with unencumbered passage over a section of Indian territory for civilian and military purposes. The International Court rejected India’s assertion that a local custom could only be established between three or more States. Having held that a limited local custom (passage for private persons, civil officers and goods) was established through long bilateral practice — some 125 years — the Court considered it unnecessary to determine whether a similar result would follow from

“Asylum may be granted only in embassies, legations, men-of-war, military camps or military airplanes, and exclusively to persons pursued for political reasons or offenses, or under circumstances involving concurrent political offenses, which do not legally permit of extradition”;

Art. 2.

“Asylum shall not be granted to persons accused of political offenses, who shall have been indicted or condemned previously for common offenses, by the ordinary tribunals”; Art. 3.

861. Asylum (Colombia/Peru), op. cit., pp. 276-277.
863. Right of Passage over Indian Territory (Portugal v. India), Judgment, ICJ Reports 1960, p. 39.
any rules of general international law. The reason was that the particular practice was intended to be “governing” of the relations between the parties and would thus prevail over any general rule.

432. The lessons of Asylum were not lost on Norway in Fisheries (United Kingdom v. Norway). There was no regional practice Norway could rely on to support its particularistic approach to base-lines for maritime delimitation. The gist of its position was that its approach was justified under general international law having regard to the responses of States and the requirements of reasonableness. It was on this basis that the Court upheld Norway’s view, and did not consider essential the United Kingdom’s assent, which it would have required to find that there existed a local custom. The Court held that all it “can see [in Norway’s position] . . . is the application of general international law to the specific case”, and it supported Norway’s position that the base-line methodology used was “an adaptation rendered necessary by local conditions”. The Court held that “certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage” were relevant to its application of the law to the facts, but not to establish historic title in derogation from international law.

433. The International Court has also held in other cases that a standard first adopted in a particular region has been incorporated into general international law, as for example the uti possidetis principle was endorsed in Frontier Dispute. Uti possidetis can broadly be defined as maintaining the territorial status quo of a territorial entity after its independence. As the Court said, “[T]he obligation to respect pre-existing international frontiers in the event of a State succession”, applied as a rule requiring the respect by newly decolonized African States of “administrative boundaries and frontiers established by the colonial powers”.

The Court held that:

864. ICJ Reports 1960, pp. 40-44.
865. Ibid., p. 44.
867. Ibid., p. 131.
868. Ibid., p. 133.
869. Ibid.
871. Ibid., p. 566 (para. 24).
872. Ibid., p. 565 (para. 21).
“[T]he principle of *uti possidetis* seems to have been first invoked and applied in the Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, *wherever it occurs* . . .” 873

And that the obligation:

“[D]erives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States . . . are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.” 874

434. In other words: “regional” claims can be accepted only if they can be accommodated within the ordinary framework of international law; there is no third, non-universal category in between general international law and the legal relations of specific States based on consent, acquiescence and recognition. This is not to deny the fact of regional hegemony at different times and places. But to the extent that such hegemony is not embodied in treaties or otherwise clearly agreed to by the affected States, it will be extralegal in character; it does not detract from the tendency of the international system towards universal or general principles.

435. Furthermore, even where regional hegemony is embodied in treaties, universal standards relating to the use of force will prevail, on the basis of Chapter VIII of the United Nations Charter (under which treaty-based enforcement action requires Security Council approval) 875.

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D. The Future of Universality

436. An early Advisory Opinion by the International Court, *Reservations to the Genocide Convention*, illustrates the complexity of the relationship between universality and regionalism. On the one hand, as in the cases just discussed, the Court did not hesitate to assert that alleged regional practice in fact amounted to a rule of *general* international law. It relied on a Latin American practice of permitting reservations to multilateral treaties, despite the contrary practice of the League of Nations. As the dissentients predicted would happen, the new approach was subsequently adopted more widely in State practice and codified in the Vienna Convention on the Law of Treaties.

437. On the other hand, the Court inferred from “the clearly universal character of the United Nations under whose auspices the [Genocide] Convention was concluded” and the near-universal participation in that treaty that certain variations were permissible as between some of its States parties. This relationship between universality and the capacity for variation might seem paradoxical; a spurious sort of unity in diversity. But it might also be seen as the necessary product of an attempt to conceive of and organize a global society of States in the persistent absence of any central authority. More recently, even this apparent qualification to the universality of international law has been brought into question, at least in the context of “universal” human rights, by claims that certain impermissible reservations — such as those that violate basic guarantees designed to support the attainment of protected rights — can be severed from human rights treaties without depriving those treaties of effect. It appears then, that reservations in human rights law

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have a different character to reservations in general international law, where objections, among other things, can render purported reservations inoperable against the objecting State.\footnote{VCLT, \textit{op. cit.}, Art. 21 (3). For analysis of current perspectives see ILC, Report of the International Law Commission Sixty-third Session (26 April-3 June and 4 July-12 August 2011), Guide to Practice on Reservations to Treaties with Commentaries, UN doc. A/66/10/Add.1.}

438. One advantage of the International Court in promoting universality is that in its contentious jurisdiction it is required to work from the particular to the general. It approaches claims between neighbouring States against the background of such “universal” principles as sovereignty, territoriality and consent. At least in cases commenced by special agreement, it also has the advantage that the decision to refer the matter to it usually entails that the outcome is to be determinative.

439. These advantages are not shared by other institutions that shape international law, such as the ILC in its “pre-legislative” activity. Nonetheless, the ILC’s texts are likely to be acceptable to States only if they can be presented in as general terms as possible. This can be seen from its past successes and failures. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, for example, has been ratified by only a handful of States.\footnote{Vienna, 8 April 1983, UN doc. A/CONF.117/14. Only seven States have ratified the treaty: Croatia, Estonia, Georgia, Liberia, Slovenia, Macedonia and Ukraine.} This is partly the result of its focus on the category of “newly independent states” — former colonies, a group that is now largely a matter of history — and the controversial divergences between its treatment of States within that category and other categories of successor States, which are not generally accepted as custom.\footnote{See, e.g., I. Sinclair, \textit{The International Law Commission} (Cambridge, Grotius, 1987), p. 79; M. Shaw, \textit{International Law} (Cambridge, CUP, 6th ed., 2008), p. 986; J. Crawford, “The Contribution of Professor D. P. O’Connell to the Discipline of International Law” (1980) 50 \textit{BYIL}; cf. J. Crawford, “State Succession and Relations with Federal States: Remarks” (1992) 86 \textit{ASIL Proceedings} 15.} More successful was the ILC’s codification of treaty rules, which culminated in the Vienna Convention on the Law of
Treaties. Although it has a reasonably high level of membership, with 113 States parties, particular aspects of the Convention are widely held to represent custom, even by non-parties, and have been applied by them and the International Court as such. Similarly, one of the best-known moves made by the ILC, masterminded by special rapporteur Robert Ago, was the elevation of its work on State responsibility to a higher level of generality — from “primary” to “secondary” rules. This contributed both to the successful conclusion of the project and to the widespread acceptance of the result, the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001.

440. So we are left with a sense that the key institutions that shape international law, including the ILC, other organs of the United Nations and the International Court, continue to nudge international law in the direction of universality. However, it is because of the process of international law that it offers us not “infinite variety”, but flexibility, even if within established parameters, to employ regional instruments and mechanisms where necessary but in due course to express or accommodate these in general terms. These are steps in what seems to be an enduring movement towards universality.